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No. 08-

IN THE

Supreme Court of the United States

PATRICK LETT,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

During sentencing, the district judge committed legal error by improperly determining the statutory sentencing range. Soon thereafter (and within the narrow time window that Fed. R. Crim. P. 35 allows), the district judge recognized his legal error and, pursuant to Fed. R. Crim. P. 35(a), imposed a proper sentence according to the instructions of 18 U.S.C. § 3553(a). The Eleventh Circuit reversed, holding that the district judge's initial misunderstanding of the applicable sentencing range did not constitute "other clear error" under Rule 35. This case thus gives rise to the following two questions:

1. Does a judge's admitted misunderstanding of his statutory sentencing authority constitute "other clear error" to permit that judge to correct a legally erroneous sentence under Federal Rule of Criminal Procedure 35(a)?

2. If a circuit court finds that a sentencing error does not qualify as "clear error" for purposes of Rule 35, can the circuit court order the district court to impose a sentence the district court determined to be legally erroneous without itself first considering whether that sentence was in fact erroneous?

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PETITION FOR A WRIT OF CERTIORARI

Patrick Lett respectfully petitions for a writ of certiorari to review the judgment of the Eleventh Circuit.

OPINIONS BELOW

The sentencing hearing at which Judge Steele initially announced his sentence is unreported. (Pet App. 41a-63a). Judge Steele's Order Amending Sentence (Pet. App. 23a-30a), and Judgment In A Criminal Case (Pet. App. 31a-40a), are also unreported. The Eleventh Circuit's decision is reported at 483 F.3d 782. (Pet. App. 3a-22a). The order denying rehearing and rehearing en banc is unreported. (Pet. App. 1a-2a)

JURISDICTION

The Eleventh Circuit issued its opinion on April 6, 2007. Patrick Lett filed a timely petition for rehearing with suggestion for rehearing en banc, which the Eleventh Circuit denied on November 30, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The principal provisions involved are 18 U.S.C. § 3553(a) and (f). (Pet. App. 65a-69a); 21 U.S.C. § 841(b) (Pet. App. 70a-80a); and Federal Rule of Criminal Procedure 35 (Pet. App. 81a-82a).

INTRODUCTION

Federal district courts impose more than 65,000 felony sentences every year.[1] Inevitably, sentencing judges occasionally commit reversible legal errors in imposing these sentences. Acknowledging that reality, the Federal Rules of Criminal Procedure expressly afford sentencing judges an efficient means (rather than awaiting appellate reversal) to correct such errors when caught quickly. Rule 35(a) provides that "[w]ithin 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error." Here, the district court did just that. Based on a misunderstanding of the applicable statutory minimum sentence, Judge William Steele at first mistakenly concluded that he was unable to sentence petitioner Patrick Lett to less than five years' incarceration for a minor, non-violent drug offense. Recognizing within the Rule 35 time period that he had erred in determining the sentencing range, Judge Steele corrected his legal error and imposed a lawful (and lower) sentence according to the terms of 18 U.S.C. § 3553(a).

The Eleventh Circuit reversed, holding that the district judge's conscientious effort to correct his sentencing mistake was improper because the Judge's legal error did not constitute "other clear error" for purposes of Rule 35. In doing so, the Eleventh Circuit adopted an unduly restrictive view of "other clear error" that undermines Rule 35's ability to allow efficient corrections to legally erroneous criminal sentences. The decision below

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[1] See U.S. Department of Justice Bureau of Justice Statistics, Criminal Sentencing Statistics, http://ojp.usdoj.gov/bjs/sent.htm (last visited Feb. 9, 2008).

thus threatens the effective and just operation of the criminal sentencing system, an issue of substantial federal importance given the tens of thousands of sentences entered every year in U.S. District Courts.

Compounding the need for review, the court's decision also conflicts with settled law in other circuits. All courts agree that Rule 35's purpose is to allow a trial judge to avoid the need for appeal where the result of that appeal will be a reversal for resentencing. Rulings from the First, Second, and Ninth Circuits have correctly concluded in comparable settings that any time that a sentencing judge operates under a legal misunderstanding as to applicable sentencing options, such a mistake necessarily constitutes reversible error requiring resentencing (and thus is the type of error allowing correction under Rule 35). The court below in this case, by contrast, concluded that not all such sentencing errors amount to "clear error" allowing for correction through Rule 35(a). Rather, according to the Eleventh Circuit, an error regarding the judge's sentencing authority will be "clear" (and thus subject to efficient correction in the district court) only if binding precedent in a factually indistinguishable case plainly reveals that error.

Finally, the Eleventh Circuit also adopted a novel and misguided "remedy" in the wake of its flawed Rule 35(a) interpretation. It ordered the District Court to impose the initial, erroneous five-year prison term—notwithstanding Judge Steele's conscientious (and unreversed) determination that he had committed error in imposing that sentence, as well as Judge Steele's express finding that only a much shorter prison term was "sufficient but not greater

than necessary" to serve the sentencing purposes Congress set out in 18 U.S.C. § 3553(a). Nothing in the language of Rule 35 or any other statutory provision justifies the Eleventh Circuit's order that the district court now impose a legally erroneous sentence on Patrick Lett.

The Eleventh Circuit's strained interpretation of Rule 35 reverses a "just determination" in this case, while also disrupting Judge Steele's efforts to achieve "simplicity in procedure and fairness in administration," and to "eliminate unjustifiable expense and delay." *See* Fed. R. Crim. P. 2. Because the Eleventh Circuit's ruling creates confusion that will lead to unjust and/or conflicting results in lower courts, this Court should intervene to provide needed guidance as to what constitutes "clear error" under Rule 35(a). Patrick Lett respectfully urges the Court to grant certiorari and reverse the decision below.

STATEMENT

A. Patrick Lett, After Honorably Serving In The U.S. Army For Seventeen Years (Including Two Tours In Iraq), Was Briefly Drawn Into Selling Drugs When Unable to Find Work.

Patrick Lett honorably served his country for seventeen years in the U.S. Army, including serving two tours of duty in Iraq. Unfortunately, for a six-week period following his return from his second deployment in Iraq, Lett departed from what Judge Steele called "an exemplary life." Pet. App. 59a. Having just returned from a war-ravaged country where he saw comrades and friends killed, Lett retired from the service and returned home to rural Alabama. Pet. App. 50a. Within the first month of returning home, however, his father died. When Lett

found himself unable to secure work, and thus unable to support his two daughters, he began drinking heavily. Id.

At this point temptation entered in the form of his cousin Michael Lett, a local drug dealer. Knowing that Patrick needed money to repair his car, Michael offered to pay Patrick for delivering a package. Pet. App. 53a. Lett acquiesced and briefly began working for Michael in a misguided attempt to get back on his feet. Id.

Within six weeks, however, Lett determined that he was on the wrong path, and, pulling himself up by his bootstraps, he ended his relationship with Michael. As Lett later testified, he found that he could not take advantage of someone suffering from the disease of addiction. Pet. App. 50a. Patrick wrote his Congressman asking for assistance in re-entering the military. Id. He re-enlisted and served in exemplary fashion for seventeen months, seemingly leaving his past behind him.

As the court below observed, however, citing William Faulkner: "The past is never dead. It is not even past." Pet. App. 5a. While Lett returned to serve his country, DEA agents were continuing an undercover investigation of Michael's drug operation. In September 2005, the government indicted Michael and many others, including Patrick. Pet. App. 5a-6a. The indictment detailed that, during the short period Patrick worked for Michael, he had on seven occasions sold small amounts of crack cocaine to an undercover agent. Pet. App. 6a.

B. After Lett Accepted Responsibility and Pleaded Guilty, U.S. District Judge William Steele Mistakenly Assessed the Statutory Sentencing Range That Congress Has Authorized for Lett's Offense.

Returning from active service to respond to his indictment, Patrick immediately pleaded guilty and took full responsibility for his, by then, nearly two-year-old crime.

At Lett's sentencing hearing, Judge Steele heard directly from Captain Iannuccilli, Lett's commanding officer during his re-enlistment. Captain Iannuccilli testified that Lett is "an outstanding NCO and soldier," who "displays daily the Army values" of "loyalty, duty, respect, selfless service, honor, integrity [and] personal courage." Pet. App. 45a, 46a-47a. Fellow sergeants who served with Lett, and who made the extraordinary effort to address the district court in person at Lett's initial sentencing, echoed these comments. Pet. App. 47a-49a. And, in perhaps the highest compliment a commanding officer can pay, Iannuccilli stated that:

> I would gladly deploy to Iraq with him and entrust my life to him. I'd trust my soldiers' lives to him. He's been nothing but an exemplary soldier for the past 12 months.

Pet. App. 47a.

Lett also spoke at his sentencing, asking Judge Steele to allow him to return to duty so he could support his family:

> I've been in the military for 17 years, 17 years. I've been in Desert Storm and I went to Iraq, Iraqi Freedom. I'm asking your Honor to let me

> try to continue my career and to take care of my family. That's the most important thing is taking care of my mom and my kids and serving this country.

Pet. App. 52a.

The Presentence Report (PSR) submitted to Judge William Steele calculated a Guidelines sentencing range of 70 to 87 months. Notably, this PSR calculation—which was adopted by the court without objection—found that Lett was eligible for the two-level "safety-valve" reduction provided in U.S.S.G. § 2D1.1(b)(11). Pet. App. 44a. But the PSR failed to make clear that this finding also meant that, under the terms of U.S.S.G. § 5C1.2(a) and 18 U.S.C. § 3553(f), Judge Steele was authorized by Congress to impose a sentence "without regard to [the] statutory minimum sentencing terms" of 21 U.S.C. § 841.

With this flawed PSR in hand, the judge carefully considered the nature and circumstances of the offense, the history and characteristics of the defendant, and numerous other factors. In this process, Judge Steele was clearly impressed by Lett's service record:

> I have someone who has a military career behind him, who since the advent of the offenses in February and March of 2004 has re-entered the military. And based on everything that I've seen in terms of the letters of recommendation and heard today from Sgt. Lett's Captain and First Sergeant and fellow soldier, there's every reason to believe that Sgt. Lett's contributions to the Army and to the military and, in turn, to this country have been substantial not only in terms

> of serving in time of war but serving in times of peace and serving, serving well.

Pet. App. 58a.

In addition to Lett's "substantial contributions" to the "military and, in turn, this country," Judge Steele also noted Lett's complete lack of criminal history. Pet. App. 59a. He specifically found that Lett had led "an exemplary life up until the time of the offenses and even after." Id. According to the judge, the "five or six weeks in 2004 in which Sgt. Lett chose to violate the law" represented "aberrant behavior." Id.

Judge Steele concluded that, in light of Lett's unique circumstances and background, the dictates of 18 U.S.C. § 3553(a) required a sentence below the PSR-calculated range of 70 to 87 months. But, in selecting a specific sentence, Judge Steele made the key legal error at issue in this petition. Lacking proper guidance from the PSR and the parties, Judge Steele incorrectly believed that the statutory minimums set forth in 21 U.S.C. § 841(b)(1)(B) prevented him from imposing a sentence of less than 60 months' imprisonment. In open court, Judge Steele stated that "my discretion is limited by Congress, and my discretion is limited to the mandatory minimum in this case, which is five years. There is no way I can legally go below that five-year mandatory minimum, even if I wanted to." Pet. App. 59a. Accordingly, Judge Steele imposed what he believed at that time to be the minimum sentence permissible by statute—five years' imprisonment. Id.

C. Immediately Recognizing His Legal Error as to the Applicable Statutory Sentencing Range, Judge Steele Corrected Lett's Sentence Pursuant to Rule 35.

Matthew Sinor, a law student who served with Lett in the Army and was present at his sentencing, realized that Judge Steele was legally mistaken about his statutory sentencing authority. Sinor faxed a letter to Judge Steele's chambers inquiring whether Judge Steele had fully appreciated his statutory sentencing authority in light of 18 U.S.C. § 3553(f). (Sinor also faxed copies of this letter to the Assistant U.S. Attorney and the retained defense lawyer involved in Lett's sentencing.)

Judge Steele—quickly realizing that he had erred in thinking that five years was the lowest statutorily authorized sentence, and also knowing that Rule 35(a) provided seven days to correct a sentence that resulted from clear error—promptly corrected his prior erroneous sentence, issuing an "Order Amending Sentence" on April 24, 2006.[2]

In a detailed written opinion, Judge Steele explained that he initially imposed a sentence of 60 months only because he erred with regard to his statutory sentencing authority. Pet. App. 28a. Upon correctly assessing that authority, Judge Steele reiterated that the "sentencing factors contained in 18 U.S.C. § 3553(a)" compelled a conclusion that Lett

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[2] The original sentencing hearing occurred on April 13, 2006 (a Thursday). Under the rules, periods shorter than 11 days do not include intervening weekends. See Fed. R. Crim. P. 45(a)(2). Thus, the seven-day window under Rule 35 included April 24, 2006. The Government has never disputed the timeliness of Judge Steele's sentencing correction pursuant to Rule 35.

"was entitled to a non-guidelines [ ] sentence." Id. Pointing to Lett's "limited role in the offense," his "lack of criminal history" and his "unblemished and significant 17 year career in the U.S. Army including two tours of duty in Iraq," Pet. App. 28a-29a, the Judge determined that Lett should be "sentenced to the time he has now served in the custody of the United States Bureau of Prisons," plus three years of supervised release. Pet. App. 29a. The court further specifically found that this sentence "addresses the seriousness of the offense, and the sentencing objectives of punishment, deterrent [sic], and incapacitation, and constitutes a reasonable sentence following consideration of the sentencing factors in 18 U.S.C. § 3553(a)." Id.

D. The Eleventh Circuit Reversed, Without Even Considering Whether The Court's Initial Sentence Resulted From Legal Error.

The government appealed Lett's sentence, arguing that Rule 35(a) did not allow Judge Steele to amend the sentencing judgment under these circumstances and that the amended sentence was unreasonable. The government asked for the sentence to be "vacated and the case remanded for further proceedings." Brief of Appellant at 19.

Adopting the prosecutor's Rule 35 argument, the Eleventh Circuit reversed the district court's corrected sentence, and did so without reaching the reasonableness issue or even examining whether Judge Steele's initial sentence was infected with legal error. The Eleventh Circuit concluded it need not reach these questions because, even if Judge Steele had committed legal error in determining the sentence for Patrick Lett, the district court had not

committed the type of "clear error" necessary to authorize correcting a sentence under Rule 35. Pet. App. 18a.

To justify its ruling, the Eleventh Circuit decision acknowledged that the Advisory Committee notes regarding "clear error" under Rule 35 speaks of errors that would "almost certainly result in a remand of the case to the trial court for further action" if raised on direct appeal. Pet. App. 14a. But the Eleventh Circuit concluded that the district court's admitted failure to understand "the breadth of its discretion under the safety valve provisions," did not constitute "clear error" even though the panel acknowledged that the misunderstanding likely "caus[ed] the court to impose a sentence higher that it would have had it correctly gauged the law." Pet. App. 16a-17a. According to the court, while the trial court may have legally erred, the error was not "clear" as "[t]here is no decision on point from any court, and reasonable people could differ about" whether the statutory minimum applies, an unprecedented definition of "clear error." Pet. App. 21a.

Adding an imprisonment insult to its legal injury, the Eleventh Circuit rejected the government's requested relief—a remand for further proceedings—and instead decided to order imposition of the initial erroneous sentence that Judge Steele had previously determined he was duty bound to correct. Without any explanation for why it was adopting a Rule 35 "remedy" not even advocated by the government, the Eleventh Circuit simply remanded the case "with instructions that the district court impose the original sentence of sixty months . . . ." Pet. App. 22a.

Lett filed a petition for rehearing with a suggestion for rehearing en banc. In the petition, Lett explained that the panel's ruling conflicted with decisions in other circuits, which have consistently held that errors regarding the range of sentencing authority are per se reversible errors requiring resentencing. On November 30, 2007, the Eleventh Circuit denied, without opinion or explanation, Lett's request for rehearing. Pet. App. 1a. Lett now respectfully urges the Court to grant his petition and reverse the decision below.

REASONS FOR GRANTING THE WRIT

A. The Eleventh Circuit's Decision Conflicts With Sentencing Law From Numerous Other Circuits.

In reversing Judge Steele's corrected sentence, the Eleventh Circuit created multiple conflicts among the circuits regarding what sentencing errors are subject to correction. All courts, including the court below, agree that Rule 35(a) is designed to permit trial courts, within the brief 7-day window the rule specifies, to correct "clear errors," or, in other words, errors that would almost certainly result in the sentence being vacated and remanded if raised on appeal. See Fed. R. Crim. P. 35 advisory committee's notes (1991). In determining what errors fall in that category, settled law in other circuits holds that a defendant has a right to have a sentencing judge determine a sentence based upon a correct view of the statutory options open to the judge. Accordingly, in other circuits that have addressed this type of issue, any sentence imposed when the sentencing judge was operating under misimpression as to the available options results in the sentence being vacated and remanded on appeal—and thus would

meet the agreed definition of "clear error" for Rule 35 purposes. In the Eleventh Circuit, by contrast, the court has defined "clear error" in such a way that only *some* such misimpressions qualify. This creates circuit conflicts and will sow lower court confusion on at three different fronts.

1. **The Decision Conflicts With First And Second Circuit Decisions Regarding Correctable "Clear Errors" Under Rule 35.**

First, the decision below directly conflicts with decisions in the First and Second Circuits regarding the use of Rule 35 to correct sentences that are based on a misunderstanding of the interplay between the sentencing guidelines and statutes. For example, in *United States v. Goldman*, 41 F.3d 785, 789 (1st Cir. 1994), the prosecutor told the court at sentencing that based on the quantity of drugs at issue, the statutory maximum for Goldman was 40 years under 21 U.S.C. § 841(b)(1)(B) (the same sentencing statute at issue here). The court sentenced the defendant to 262 months. Id. In fact, because the defendant had a prior drug conviction, the maximum term was life. The prosecutor informed the court of the mistake within the seven day window, and the court increased the defendant's term by 98 months under Rule 35. Id.

The defendant appealed the adjustment, but the First Circuit held that the sentencing court's misunderstanding as to the applicable statutory maximum constituted clear error. Id. In words that are particularly appropriate here, the First Circuit explained why it should not unduly restrict a district court's "right to correct an unlawful sentence" under Rule 35:

> As for fundamental fairness, it is difficult to see anything unfair about the district court's decision to correct a clear error in a sentence where the error relates solely to the precise length of a lengthy prison term and the correction is made with great promptness. . . . [Such a] correction is surely what the drafters of [Rule 35] had in mind. Given the complexity of the guidelines, the seven-day window is a well-advised precaution and may operate as readily in favor of the defendant as against him.

Id.

Similarly, in *United States v. Waters*, 84 F.3d 86, 90-91 (2d Cir. 1996), the court originally sentenced a defendant to six-months' imprisonment, but failed to realize that, under U.S.S.G. § 7B1.3, the Bureau of Prisons would credit eight months that the defendant had served in state prison against that sentence, meaning that the defendant would be immediately released. The judge determined that he had committed clear error and increased the sentence to fourteen months (so that with the credit the defendant would still serve six months in prison). Id. at 89. In a "candid admission" at resentencing that mirrored Judge Steele's statements in this case, the sentencing judge in *Waters* noted:

> I am concerned about what happened here and the confusion that resulted. I was clearly not aware of the provision of law [under] which this time was credited to the defendant under 3585. . . . I think that at the original time of sentencing . . . I was required to take that into account[] . . . and it was error not to

Id. at 91.

On appeal, the circuit court rejected the defendant's argument that the judge lacked power under Rule 35 to correct the sentence under the circumstances. According to the Second Circuit, the district court's failure to consider U.S.S.G. § 7B1.3 and the way that advisory guideline provision interacted with 18 U.S.C. § 3585(b) (the statutory provision regarding credits for other imprisonment) constituted "clear error." *Waters*, 84 F.3d at 91. The court explained that "[t]he [district] court's resentencing of Waters was not the result of misgivings about the severity or the leniency of the sentence imposed or a 'change of heart' regarding the sentence," id. at 90, but rather resulted from the judge's misunderstanding of the legal provisions impacting the applicable sentencing rules.

The holdings in *Goldman* and *Waters* cannot be squared with the Eleventh Circuit's holding here. Just as in *Goldman*, the sentencing court in this case corrected a sentence that was based on a flawed understanding of the applicable statutory endpoint; just as in *Waters*, the sentencing court here failed to properly account for the interaction between the sentencing guidelines and the applicable statute. And like *Waters*, the judge's own "candid admission" showed that the corrected sentence did not result from a "change of heart," but rather a corrected understanding of the applicable legal rules. Such an error falls neatly within Rule 35's scope as properly interpreted by the First or Second Circuits, but not under the Eleventh Circuit's flawed interpretation of that rule.

2. The Decision Creates A Conflict With The Ninth Circuit On Whether Errors As To Safety-Valve Eligibility Require Resentencing.

The decision below also directly conflicts with the Ninth Circuit's recent decision in *United States v. Mejia-Pimental*, 477 F.3d 1100 (9th Cir. 2007), regarding the impact of a failure to properly understand the impact of safety-valve eligibility. There the sentencing court had incorrectly determined that the defendant was not safety-valve eligible, and thus "sentenced [the defendant] with reference to a mandatory minimum term" that did not in fact apply. Id. at 1102. According to the circuit court in *Mejia-Pimental*, "[e]rrors in the determination of safety valve eligibility *require resentencing*." Id. at 1109 (emphasis added). Indeed, the court said that this is true "even where the district court indicated that it would not have sentenced below the mandatory minimum." Id. The Ninth Circuit went on to explain that "the fact that a district court used the mandatory minimum as a reference point *requires resentencing* if the defendant was in fact safety valve eligible." Id. (emphasis added). The court also explained the reason for this per se resentencing requirement:

> The type of discretion afforded a court that is restrained by a statutory minimum is wholly unlike that afforded one that is not. It is therefore impossible for appellate courts to determine how a district court sentencing under a mandatory minimum might have exercised its sentencing discretion had it not been so constrained.

Id. *Mejia-Pimental* thus reflects a simple (and sound) rule: If the sentencing court erroneously believes that a mandatory minimum applies, the sentence must be vacated on appeal.

The decision below, however, contradicts that rule. The appeals court here acknowledged that Rule 35(a) allows courts to amend sentences that would almost certainly result in remand on appeal. Further, it acknowledged that the trial court may have erred in determining that the mandatory minimum applied, and even that this error likely caused the sentencing judge to impose a higher sentence than he otherwise would have. Pet. App. 16a-17a. The court determined, though, that such an error did not qualify for Rule 35(a) correction, or, in other words, that such an error was not of the type that would almost certainly result in a remand for resentencing on appeal. According to the Eleventh Circuit, it was not enough that Judge Steele erred in determining that the statutory minimum applied, but rather Judge Steele must have transgressed clearly settled binding precedent concerning the application of the statutory minimum before the error qualifies for correction under Rule 35(a).

In short, the Ninth Circuit has concluded that errors in determining whether a mandatory minimum apply are the type of error that requires a remand (and thus would plainly justify self-correction under Rule 35), while the Eleventh Circuit has adopted a contrary approach. Only this Court can effectively resolve which of these mutually exclusive approaches should prevail.

3. The Decision Conflicts With Settled Law Regarding Reversible Sentencing Errors Generally.

The decision below also conflicts with settled understandings among the circuits on a more fundamental level. Before the decision below, one agreed principle of criminal sentencing was that a defendant is entitled to a sentencing judge who "fully appreciate[s] his options." *United States v. Thorpe*, 191 F.3d 339, 344 (2d Cir. 1999) (quoting *United States v. Rivers*, 50 F.3d 1126, 1132 (2d Cir. 1995)). Ensuring that such understanding exists is "a particularly important safeguard when what is really at risk is an individual's liberty." *Thorpe*, 191 F.3d at 344.

Accordingly, appellate courts have uniformly insisted that a sentencing judge have a full and accurate awareness of the lawful sentencing discretion available in formulating a sentence. Thus, while appeals courts review the *exercise* of such discretion under a very deferential standard, where the sentencing judge had an errant view of the *existence* of such discretion, appeals courts have not hesitated to find that such an error *requires* vacating and remanding the sentence. See, e.g., *United States v. Delgado-Reyes*, 245 F.3d 20, 22-23 (1st Cir. 2001) (remanding for resentencing when record suggested sentencing court had an "erroneous view of the law" concerning its departure authority); *Thorpe*, 191 F.3d at 343 (vacating sentence where court was operating under mistaken belief that to sentence defendant to probation it would need to undertake a downward departure); *United States v. Dominguez*, 296 F.3d 192, 196 (3d Cir. 2002) (vacating sentence where trial

court had "misapprehended" precedent and concluded "it lacked discretion"); *United States v. Gardiner*, 463 F.3d 445, 461 (6th Cir. 2006) (vacating and remanding sentence where district court appeared to be "harboring the misapprehension that, under *Booker*, he could not enhance Gardiner's sentence based upon factors that were not determined by the jury beyond a reasonable doubt"); *United States v. Mancari*, 463 F.3d 590, 598 (7th Cir. 2006) (vacating sentence and remanding where the trial judge "appears to have been under the misimpression that its discretion was still cabined by the pre-*Booker* departure jurisprudence"); *United States v. Pierce*, 132 F.3d 1207, 1208 (8th Cir. 1998) (remanding because the district court mistakenly believed that it was required to sentence the defendant to prison). Simply put, all of these circuits recognize a defendant's right to a sentencing judge who is aware of the full range of lawful sentencing options, a breach of which requires a reversal and a remand for resentencing.

The decision below, however, contravenes this settled understanding. As noted above, while the Eleventh Circuit acknowledged that the sentencing judge had the power to self-correct errors that would otherwise result in vacating the sentence on appeal, it concluded that the error here, an error in determining the available sentencing range, did not allow for such self-correction. The irrefutable implication of the decision below is that, in the Eleventh Circuit and only in the Eleventh Circuit, errors as to the available sentencing range—even when coupled with a judge's statement that he would like to go lower but feels constrained—would not necessarily result in vacating the sentence on appeal.

The opinion thus interjects uncertainty into a previously settled area of the law. And such uncertainty is particularly troubling "when what is really at risk is an individual's liberty." *Thorpe*, 191 F.3d at 344

B. The Eleventh Circuit's Interpretation Of "Clear Error" Eviscerates Rule 35's Ability To Serve As The "Efficient and Prompt" Corrective Remedy The Rules Drafters Envisioned.

1. Rule 35(a) Is Specifically Designed To Avoid The Need For Appeal Where The District Judge Quickly Recognizes And Corrects His Own Reversible Sentencing Error.

Not only does the Eleventh Circuit's decision create conflicts among the circuits, but it also reflects a flawed understanding of Rule 35(a). The rule is designed to provide an "efficient and prompt" method for district courts to correct sentencing errors without the need for appeal. See Fed. R. Crim. P. 35 advisory committee's notes (1991). To that end, the Rule provides that, "[w]ithin 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error." Fed. R. Crim. P. 35(a). And consistent with Rule 35(a)'s goal, the drafters specifically state that "clear error" includes those "errors which would almost certainly result in a remand of the case to the trial court for further action" if an appeal were taken. See Fed. R. Crim. P. 35 advisory committee's notes (1991). Given the tens of thousands of sentences that federal courts impose every year, the need for this type of efficient and prompt alternative to a slow and costly appeal is obvious (and is a corrective mechanism regularly

used by federal prosecutors to correct sentences erroneously set too low).

Unfortunately, the Eleventh Circuit's flawed view of "clear error" eviscerates Rule 35's ability to serve its intended function. The Eleventh Circuit's decision essentially creates two different kinds of reversible sentencing errors. Under the Eleventh Circuit's decision, only those reversible errors demonstrated by binding precedent clearly on point, or otherwise entirely beyond debate, are correctable through Rule 35, leaving other reversible legal errors to be corrected after the expense and delay of a needless appeal. Creating such a distinction in reversible sentencing errors prevents Rule 35 from serving as the "efficient and prompt" alternative to correction on appeal that it was intended to be.

2. The Error Here Fits Well Within Rule 35(a)'s Scope, And The Eleventh Circuit Erred In Concluding Otherwise.

At Lett's initial sentencing, Judge Steele made a fundamental legal error concerning his statutory sentencing authority: He failed to appreciate that in Lett's circumstances, 18 U.S.C. § 3553(f) authorized the judge to impose a sentence "without regard to [the] statutory minimum sentencing terms" of 21 U.S.C. § 841. Instead, the judge mistakenly believed that 21 U.S.C. § 841(b)(1)(B) *prevented* him from imposing a sentence lower than 60 months in prison. Reflecting this, at Lett's initial sentencing, Judge Steele stated "my discretion is limited by Congress . . . to the mandatory minimum in this case, which is five years." Pet. App. 59a.

It is undisputed, however, that Lett satisfied the "safety-valve" requirements of § 3553(f). Indeed, the

PSR expressly stated that Lett met the elements of U.S.S.G. § 5C1.2, see Pet. App. 44a, which merely restate, verbatim, the statutory safety-valve requirements. *Compare* U.S.S.G. § 5C1.2 *with* 18 U.S.C. § 3553(f). Given that Lett met these requirements, Judge Steele's discretion clearly was not limited in the manner he thought. For defendants like Lett who meet the safety-valve requirements, Congress provides a statutory sentencing range of 0 to 40 years' imprisonment, not the 5 to 40 year range that Judge Steele erroneously believed was controlling during the initial sentencing hearing.

Neither the government nor the Eleventh Circuit decision below disputes that Lett meets the safety valve criteria set forth by Congress. Rather, to assail the corrected sentence imposed by Judge Steele, the government has argued and the Eleventh Circuit has adopted a novel interpretation of "clear error" under Rule 35. According to the court below, it did not matter whether Judge Steele had in fact made a legal error concerning his statutory sentencing authority;. Rather, because the Eleventh Circuit thought the error was arguable, then the district judge lacked authority under Rule 35 to correct the legal error he had come to identify. Pet. App. 18a. But there is no reason to believe that Rule 35(a) is designed to prevent a legally erroneous sentencing determination from being corrected whenever the legal error is subject to debate by a clever federal prosecutor or defense attorney seeking to insulate a legally erroneous sentence from ready correction. Indeed, unless this Court disagrees with Judge Steele's conclusion that he initially made a legal error concerning his statutory sentencing authority, the purposes of Rule 35(a) are very poorly served by the

Eleventh Circuit's declaration that Judge Steele was not permitted to correct the legal error that he quickly acknowledged. When a district court quickly realizes a significant legal error concerning its sentencing authority, it is both efficient and wise for that court to amend its sentencing judgment within the seven-day period provided for under Rule 35(a) rather than create the necessity for an appeal to achieve a legally sound sentencing outcome.

Ultimately, the Eleventh Circuit ruling seems based on a misplaced concern about Rule 35(a) becoming a device to prompt district courts to act on a change of heart regarding their discretionary sentencing determinations. But the record below shows that there was no change of heart here—throughout the proceedings, the judge consistently determined Lett's extraordinary personal history, his exemplary military service, and his "limited role in the offense," 18 U.S.C. § 3553(a), required a below-guideline sentence, and consistently determined that the shortest legally available term of imprisonment would be appropriate. Stated simply, Judge Steele never changed his mind about the appropriate sentence for Patrick Lett. Judge Steele simply erred initially in determining what that legally-minimum sentence was. This case represents precisely the kind of "clear error" the Rule is designed to allow sentencing judges to correct.[3]

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[3] The Eleventh Circuit decision below hints that Judge Steele's sentencing correction involved a reinterpretation of U.S.S.G. § 5C1.2, a provision of the sentencing guidelines which reiterates a district court's statutory authority under 18 U.S.C. § 3553(f) to impose a sentence "without regard to [the] statutory minimum sentencing terms" in certain cases. But Judge Steele's corrected sentence and the error he made at the initial

Especially because the Eleventh Circuit has not contradicted Judge Steele's ultimate conclusion that he initially made a legal error concerning his statutory sentencing authority, it is hard to understand what legal or practical value the Circuit's approach to Rule 35(a) furthers. The whole point of Rule 35(a) is provide a brief window of time within which district judges may correct legally erroneous sentencing determinations so that neither the Government nor the defendant is forced to seek appellate relief to correct a legal error that has a consequential impact on the sentence imposed. A sentencing appeal can often take a year or more to be fully briefed and adjudicated at the appellate level—indeed, nearly two years have now elapsed since the 2006 imposition of Lett's sentence by Judge Steele—but the Eleventh Circuit has now interpreted Rule 35 to create a class of sentencing errors that can only be

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(continued...)

sentencing did not turn on any guideline provision: the fundamental legal error that Judge Steele quickly corrected concerned his statutory sentencing authority in light of 18 U.S.C. § 3553(f), the statutory safety valve provision.

Moreover, the Eleventh Circuit has itself previously indicated that a district court's initial sentencing pursuant to the wrong guideline could be corrected as "other clear error" pursuant to the authority provided in Rule 35(a). See *United States v. Yost*, 185 F.3d 1178, 1179 (11th Cir. 1999). Logically, the same rule can and should apply if and when a district court's initial sentencing ruling was pursuant to the wrong statutory sentencing range. Indeed, the only obvious distinction between this case and *Yost* is the fact that in *Yost* the sentencing correction approved by the Eleventh Circuit *increased* the sentence given to the defendant pursuant to the prosecutor's request, whereas in this case the disapproved sentencing correction *decreased* the sentence given to the defendant.

corrected by a circuit court through a time-consuming and costly appeal rather than by the "efficient and prompt," "good faith" efforts of a district judge. See Fed. R. Crim. P. 35 advisory committee's notes (1991) (Rule 35 is designed to provide "efficient and prompt" alternative to appeal); Pet. App. 21a (trial court acted in "good faith" in imposing corrected sentence).

Consequently, unless corrected, the Eleventh Circuit's approach to Rule 35(a) will require both the Government and criminal defendants to resort to the costly and laborious appellate process in many cases in which a clear sentencing error could be readily corrected immediately by the district court. There is, of course, no shortage of sentencing appeals concerning contested legal issues; Rule 35(a) should not be applied in a manner that requires the parties to further clutter the appellate courts with matters involving errors that can and should be dealt with expeditiously at the district court level.

C. The Eleventh Circuit Improperly Ordered The District Court To Impose A Long Prison Sentence On Patrick Lett That The District Court Determined Was Legally Erroneous Without Clarifying Whether That Sentence Was In Fact Erroneous.

The flaws in the Eleventh Circuit's Rule 35(a) analysis also extended to the remedy it ordered. On appeal, the government had expressly asked to have Lett's sentence "vacated and the case remanded for further proceedings." Brief of Appellant at 19. However, after holding that Rule 35(a) did not permit correction of Judge Steele's initial sentencing error, the Eleventh Circuit remanded the case "with instructions that [the district court] impose the

original sentence of sixty months . . . ." Pet. App. 22a. This unusual mandate requiring Judge Steele to impose a specific prison sentence on Patrick Lett finds no support in the language of Rule 35 or any statutory provision. Significantly, if the Eleventh Circuit's suspect sentencing order is allowed to stand, new and challenging procedural, statutory and constitutional questions arise.

Before the Eleventh Circuit, the government argued that Lett's below-guideline sentence was unreasonable, and it seems unlikely that the government would have appealed Lett's corrected sentence were it not concerned about the substantive reasonableness of the sentence Judge Steele decided was appropriate. Moreover, the government specifically requested the remedy of a "remand[] for further proceedings" because it likely appreciated that, even if Lett's corrected sentence were held to be unreasonable on appeal, new and complicated statutory and constitutional issues could arise if Judge Steele were ordered to impose a sentence of 60 months on Patrick Lett given the facts found and legal conclusions reached during the initial sentencing proceedings in the district court.

Significantly, the issues and questions raised by the Eleventh Circuit's sentencing order are greatly complicated following the U.S. Sentencing Commission's decision to lower all guideline sentences for crack cocaine offenses effective November 1, 2007,[4] and the Commission's subsequent decision to make this change apply

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[4] See U.S. Sentencing Commission. Amendments to the Sentencing Guidelines (May 11, 2007), *available at* http://www.ussc.gov/2007guid/may2007rf.pdf, at 72.

retroactively as of March 3, 2008.[5] Among other consequences, the new crack guidelines converts a 60-month sentence for Patrick Lett, which was a below-guideline sentence when first announced by Judge Steele, into a within-guideline sentence (and not even a sentence at the bottom of the now applicable guideline range). As detailed above, based on Lett's extraordinary personal history, his exemplary military service, and his minor role in the offense, Judge Steele has consistently determined that 18 U.S.C. § 3553(a) demands a below-guideline sentence for Patrick Lett because a within-guideline sentence would be "greater than necessary" to achieve the purposes of sentencing detailed in § 3553(a)(2).[6]

Had the Eleventh Circuit addressed whether Lett's corrected below-guideline sentence was unreasonable

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[5] See U.S. Sentencing Commission, December 11, 2007 Promulgated Amendment (Dec. 11, 2007), *available at* http://www.ussc.gov/2007guid/030308rf.pdf (retroactivity provision); U.S. Sentencing Commission, U.S. Sentencing Commission Votes Unanimously to Apply Amendment Retroactively for Crack Cocaine Offenses (Dec. 11, 2007), *available at* http://www.ussc.gov/press/rel121107.htm (sentencing commission news release regarding retroactivity).

[6] It is informative to compare the facts and results here with the Court's recent sentencing decision in *Gall v. United States*, 128 S. Ct. 586 (2007). In *Gall*, the Court upheld a sentence of probation for defendant Brian Gall who, after playing a large part in a drug conspiracy for over half a year while in college, voluntarily withdrew from the conspiracy and started leading a law-abiding life. Id. at 591-93. In this case, the Eleventh Circuit has now ordered the imposition of a five-year prison term on Patrick Lett who, after playing a small part in a drug conspiracy for a few weeks after having served 17 years in the U.S. Army, voluntarily withdrew from the conspiracy and returned to honorable military service.

as the government had urged, its decision to order the district court to impose a specific sentence might make some sense. But, critically, the Eleventh Circuit decided not even to address the reasonableness of Judge Steele's substantive sentence judgments and did not examine the sentencing instructions of 18 U.S.C. § 3553(a) in any way. (Indeed, the panel's sympathetic discussion of Lett's personal history tacitly suggests that the panel saw considerable merit in Judge Steele's conclusion that the § 3553(a) factors required a below-guideline sentence.) Showing a peculiar and problematic disinterest in considering substantive sentencing law, the Eleventh Circuit decided to focus exclusively on Rule 35(a) particulars, but then the panel disregarded the government's suggested Rule 35 remedy without providing any reasoned account for whether or why either the initial 60-month sentence or the corrected shorter sentence would be legally sound.

Tellingly, when ordering a sentence that Judge Steele had previously determined to be statutorily improper, the Eleventh Circuit did not reference—and really could not possibly cite—any statutory provision or other legal authority to justify its novel "remedy" or the imposition of a specific sentencing term in the district court. Indeed, because Judge Steele expressly found that a 60-month sentence of imprisonment would be "greater than necessary" to achieve the purposes of sentencing Congress set out in § 3553(a)(2), and because the Eleventh Circuit has not disturbed or even questioned this key finding, the Eleventh Circuit's sentencing order arguably requires Judge Steele to transgress congressional sentencing instructions and his judicial oath.

Moreover, beyond the new crack guideline complications and statutory authority concerns, ordering the imposition of 60 months' imprisonment on the unique facts of this case raises serious constitutional problems. To order that a defendant receive an unnecessarily long term of imprisonment due to alleged procedural errors—errors based in the district court's own mistake about its sentencing authority which it tried to remedy—raises serious issues under the Due Process Clause and the Cruel and Unusual Punishments Clause. *Cf. Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (explaining that, when a severe punishment fails to "measurably contribute[to proper sentencing goals], it is nothing more than the purposeless and needless imposition of pain and suffering, and hence an unconstitutional punishment" (citation and punctuation omitted)); *Williams v. New York*, 337 U.S. 241, 247 (1949) (suggesting possible due process problems with "rigid adherence to restrictive rules" that may prevent judges from considering "pertinent information" at sentencing). Moreover, given the deficient performance of Lett's initial trial counsel and the prosecutor in this case—both of whom contributed to Judge Steele's legal confusion by erroneously suggesting he could not impose a sentence of less than 60 months' imprisonment—the Eleventh Circuit's imposition of the original erroneous 60-month prison sentence may trigger distinct constitutional issues under the Fifth and Sixth Amendments. *Cf. Townsend v. Burke*, 334 U.S. 736, 740-41 (1948) (finding a due process violation when the sentencing process was impacted by the "prosecution's submission of misinformation to the court or was prejudiced by the court's own

misreading of the record"); *Glover v. United States*, 531 U.S. 198, 202-05 (2001) (explaining that "counsel's failure to object to an error of law affecting the calculation of a sentence" could constitute ineffective assistance of counsel).

Critically, this Court need not—and should not explore all the complicated guideline, statutory and constitutional implications of ordering the imposition of an excessive and unnecessary sentence of 60 months' imprisonment for Patrick Lett in light of the unique facts of this case. Rather than rule on these matters, this Court can and should simply recognize that, as the government itself has suggested, even if Judge Steele lacked authority to correct his initial sentence, it is improper to order Judge Steele to now impose a sentence of 60 months imprisonment upon remand. Consequently, this Court should, at the very least, summarily reverse this aspect of the Eleventh Circuit's ruling and order this matter remanded for further proceedings in the district court, a holding that would accord with the government's own express request for relief when it initiated an appeal from Lett's corrected sentence nearly two years ago.

CONCLUSION

For the above reasons, Petitioner Patrick Lett respectfully requests that the Court grant certiorari and reverse the decision below.

Respectfully submitted,

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February 12, 2008

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 06-12537

D. C. Docket No. 05-00266-CR-003-WHS

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

versus

PATRICK LETT,
Defendant-Appellee.

On Appeal from the United States District Court
For the Southern District of Alabama

BEFORE: CARNES, PRYOR AND FARRIS*, Circuit Judges.

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT.

/s/ ED CARNES
UNITED STATES CIRCUIT JUDGE

Ord-42
(12/01)

*Honorable Jerome Farris, United States Circuit Judge for the Ninth Circuit, sitting by designation.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 06-12537

D. C. Docket No. 05-00266-CR-003-WHS

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

versus

PATRICK LETT,
Defendant-Appellee.

Appeal from the United States District Court
For the Southern District of Alabama

(April 6, 2007)

Before Carnes, Pryor and Farris*, Circuit Judges.
CARNES, Circuit Judge:

The facts of Patrick Lett's life that gave rise to this case read somewhat like a morality play. He was born and raised in Monroe County, Alabama. He had what he described as a nice childhood. Married and divorced, he has three daughters. He served his country in the National Guard and then the regular

* Honorable Jerome Farris, United States Circuit Judge for the Ninth Circuit, sitting be designation.

army. Some of his service was in Iraq as part of Operation Iraqi Freedom, and all of it was honorable. He received numerous citations and medals for meritorious achievement. His superior officers used superlatives to describe him and his dedication to the missions he was assigned.

After fourteen years in the military, Lett returned to civilian life the week before Christmas in 2003. It was not a happy time for him. He had lost friends and had seen fellow soldiers killed in Iraq. He had also seen what he described as "some very, very strange things." While he was in Iraq, his fiancée died. When he returned home his father was dying. He had trouble supporting his children. He felt pressured. He was depressed. He began to drink heavily, which only helped fuel the downward trajectory of his life. Lett felt, in his words, like "the lowest person on the face of the earth."

Enter temptation in the form of his cousin, Michael. Michael was a big time cocaine distributor, or what passes for one in Monroe County. He bought powder cocaine wholesale in Montgomery for resale as cocaine and crack back home. For distribution, Michael had something of a friends and family plan. Influenced perhaps by the cultural mores of a south Alabama county, he did not rely on strangers or mere acquaintances to sell his drugs for him. Instead, he used his personal friends and members of his family.

Michael eventually prevailed upon Patrick to be one of his street level sellers, operating out of trailers, vacant houses and yards. On seven occasions during a five-week period in the Spring of 2004, Patrick Lett sold cocaine and crack cocaine to Ceonia Stanton, and sometimes to another person in Stanton's presence,

in quantities ranging from just over a gram to nearly fourteen and a half grams. It was typical drug dealer conduct. But Patrick Lett was atypical, because he was a drug dealer with a conscience. With his conscience came remorse and a search for redemption. He felt guilty about his actions. He realized, as he put it, that "it takes a cruel-hearted person to actually take advantage of someone who has a disease, and that disease is addiction," and he "decided to get on my knees and pray a little harder and ask God to pull me back together, . . . which [H]e did." Lett quit selling drugs and left Michael's operation to the devil's own devices.

Lett re-enlisted in the military in October 2004, and again he rendered exemplary service to his country. His superior officers attested that Lett, a sergeant, was an outstanding soldier, dedicated to the welfare of his men and to accomplishing whatever mission he was given. He made his men's lives better and his superiors' jobs easier. His captain said that Lett "exemplified the Army values" of "loyalty, duty, respect, selfless service, honor, integrity, personal courage." He would be willing to entrust his life to Lett.

Having pulled himself out of the world of illegal drugs and gone back to serving his country, Lett may have thought that he had left his past behind him. As Faulkner reminded us, however, "The past is never dead. It is not even past." William Faulkner, Requiem for a Nun 92 (1951). It turns out that Ceonia Stanton, to whom Lett had sold the drugs, was an undercover law enforcement agent working as part of a task force aimed at shutting down Michael Lett's operation. In September 2005, a grand jury

indicted Lett and fourteen others, including Michael, for various federal drug crimes stemming from their roles in the conspiracy. Lett pleaded guilty to seven counts of possession with intent to distribute, one for each of the sales to the undercover agent, all in violation of 21 U.S.C. § 841(a)(1).

I.

The presentence investigation report noted that Lett admitted selling 60.42 grams of crack cocaine and 7.89 grams of powder cocaine, which put his base offense level at thirty two. It recommended, and the government did not object to, that level being lowered: by two levels because he met the five criteria for a safety valve reduction; by another two levels because he accepted responsibility for his crime; and by one more level because he timely notified the government of his intention to plead guilty before it dedicated substantial resources to prosecuting him. Those reductions left an offense level of twenty seven.

With that adjusted offense level and no prior criminal record, Lett's advisory guideline range was seventy to eighty-seven months imprisonment. He faced a mandatory minimum prison sentence of sixty months on five of the counts under 21 U.S.C. § 841(b)(1)(B). About those statutory mandatory minimum sentences, and the resulting inapplicability of the U.S.S.G. § 5C1.2 safety valve provision, the PSR stated:

> Based on a total offense level of 27 and a criminal history category of I, the guideline range of imprisonment is 70 to 87 months. Counts 8, 9, 10, 11, and 12, each carry a mandatory minimum penalty of 60 months. Although it

> appears that the defendant is eligible for consideration under U.S.S.G. § 5C1.2, because the minimum of the guideline range is 70 months, which is greater than the statutory mandatory minimum 60 months, 5C1.2 consideration is a moot issue.

Neither the government nor Lett lodged any objection to the PSR, and with the consent of both parties the district court adopted it as written. Lett called three witnesses to testify for him at the sentence hearing: a sergeant, a first sergeant, and a captain, all of whose testimony we alluded to earlier in describing Lett's military service. Two of the three implored the court to impose the least sentence the law allowed. Lett himself also took the stand. He admitted the drug crimes he had committed during the short period of time two years earlier, accepted responsibility for them, described the "pride and respect and unity and honor" he feels when he puts on the uniform in service of his country, and asked the court to give him a sentence that would allow him to stay in the military so that he could continue supporting his three daughters, the oldest of whom was sixteen and pregnant.

At the end of the testimony, Lett's counsel asked the district court to put him on supervised release "or some kind of probation" or to give him "the minimum sentence possible" so that he could stay in the military. According to counsel, the Army was willing to allow Lett to continue his service if the district court sentenced him to probation. Even though he made the request, counsel acknowledged that "there's a minimum mandatory five-year sentence under the

statute, and it would be very hard for the Court to find a five-year sentence that's constitutionality excessive," so he asked the court to give the lightest sentence possible.

The district court judge was well suited to evaluate Lett's military service, having himself served for six years as an officer and pilot in the United States Marine Corps and another fourteen years in the Army National Guard as a pilot and the commanding officer of an assault helicopter company. He was sympathetic to Lett and impressed with how different this case was from others he had seen. Lett's complete lack of any prior criminal record and the substantial contributions he had made to the military in service of his country made him stand out. The judge reviewed Lett's service fitness ratings, which ranged from good to excellent and among the best in regard to promotion potential. He summarized the letters he had received and the testimony he had heard as proving that Lett was "an extremely valuable asset to the United States Army, an outstanding NCO, a model soldier, a role model with excellent work ethic, a dynamic, innovative leader, a shining example for his peers and subordinates."

The district court construed the arguments of Lett's counsel as a motion to enter a non-guideline sentence and to determine that the statutory mandatory minimum was constitutionally excessive so that he could sentence below it. The court did not find the mandatory minimum sixty-month sentences constitutionality excessive, but it decided not to sentence any higher than that. The court concluded that Lett's exemplary military service and his lack of

any criminal history, other than during those five weeks he had sold drugs for his cousin, justified a variance under 18 U.S.C. § 3553(a) from the seventy to eighty-seven months range.

However, the court also decided that the statutory five-year mandatory minimum provided a floor beyond which it could not go:

> There is no way that I can legally go below that five-year mandatory minimum, even if I wanted to. So, discretion is limited by Congress, who has dictated that people who commit these kinds of crimes shall serve no less than 60 months, or five years.

The court ordered that the sixty-month sentence on each of the seven counts be served concurrently.

II.

Enter Matthew Sinor, a close friend of Lett's who had served with him in the Army for three years and a second-year student at Moritz College of Law at the time of sentencing. Sinor traveled from Columbus, Ohio to Mobile, Alabama for the proceeding, and when he returned to law school described what had happened to his criminal sentencing professor, Douglas A. Berman. Professor Berman suggested a theory to Sinor which he in turn conveyed to the district court in a letter dated April 17, 2006, four days after the court had sentenced Lett to sixty months imprisonment.

In his letter Sinor informed the court of the professor's view that the safety valve provisions in 18 U.S.C. § 3553(f) and U.S.S.G. § 5C1.2 operated to free the court of the mandatory minimum otherwise

required by 21 U.S.C. § 841(b)(1)(B). Sinor told the court he was concerned that defense counsel had not raised the argument, and that time for doing something about it under Fed. R. Crim. P. 35(a) was running out. Sinor sent copies of his letter to counsel for Lett and the government, but so far as the record shows neither filed a response.

The district court issued an order modifying Lett's sentence on April 24, 2006, which was the last day of the seven-day period for correcting sentences under Rule 35(a), as extended by the counting provision in Fed. R. Crim. P. 45(a)(2). The court explained that at the sentence hearing it had accepted the PSR's recommendation that the safety valve provision did not apply to Lett's sentence because neither Lett nor the government had objected to the PSR, and because the court believed that result was correct. Having reconsidered, the court now decided otherwise.

In setting out the reasons for changing its mind, the court explained in detail how it had interpreted the safety valve provision in § 5C1.2 before the decision in United States v. Booker, 543 U.S. 220, 125 S. Ct. 738 (2005):

> It should be noted here that, in the pre-Booker world of sentencing, this Court has consistently denied other Defendants benefit of the safety valve where the guidelines range was calculated to be above the mandatory minimum. The basis for this result is the Court's belief that § 5C1.2 creates two subsets of Defendants; those whose guidelines sentences are above the

mandatory minimum, and those Defendants whose guidelines sentences are below the mandatory minimum. It is this Court's interpretation of that provision that compelled it to conclude that only those Defendants whose guidelines sentences fell below the mandatory minimum were entitled to application of that part of the safety valve which authorizes the Court to impose a sentence below the mandatory minimum. Otherwise, § 5C1.2 makes no sense.

In other words, how could the Court impose a sentence "in accordance with the applicable guidelines without regard to any statutory minimum sentence" if the applicable guidelines range is above the mandatory minimum? Any sentence imposed below the mandatory minimum in such a case necessarily would be outside the applicable guidelines, leaving the Court with no guidelines at all.

Moreover, had Congress and the Sentencing Commission intended that any safety valve-eligible Defendant, regardless of that Defendant's projected guidelines range, be qualified for a lower than mandatory sentence, they could have said so. But Congress and the Sentencing Commission did not say so. In fact, a reasonable interpretation of the [safety valve

> provision] compels a conclusion that the language "in accordance with the applicable guidelines" imposes an additional criterion that a Defendant must meet in order to qualify for a sentence below the mandatory minimum. That is, the Defendant must have a projected guidelines sentence below that minimum.

(emphasis in original; paragraph breaks added).

The court then asked itself: "Now, what does all of this mean in the post-Booker world," and answered its own question with the candid admission that: "The answer certainly is not clear, because there is little or no guidance from the courts of appeal or even from sister courts throughout the country." It found the decisions in United States v. Cherry, 366 F. Supp. 2d 372 (E.D. Va. 2005), and United States v. Duran, 383 F. Supp. 2d 1345 (D. Utah 2005), of little help because they "involved guideline ranges below the mandatory minimum."

Nonetheless, the district court concluded, without further explanation, that in the post-Booker world, "when all five conditions of § 5C1.2 are satisfied, the Defendant is safety valve eligible and the Court's sentencing discretion is not bounded by a statutory mandatory minimum sentence, irrespective of whether the accurately calculated advisory guidelines sentencing range is above or below that mandatory minimum."

With its discretion now unfettered by the five-year mandatory minimum of 21 U.S.C. § 841(b)(1)(B), the district court reapplied the § 3553(a) factors in light of Lett's limited role in the offense, his

voluntary withdrawal from the criminal enterprise followed by his re-enlistment in the Army where he remained on active duty until his arrest, his lack of criminal history, and his unblemished and significant seventeen-year career in the military, including two tours of duty in Iraq. In light of those factors, the court concluded that it should vary downward so that the sentence imposed would be time served, which amounted to eleven days. The court imposed that sentence on all seven counts to run concurrently. As a result, Lett was released from prison subject to a term of supervisory release.

III.

The government appeals the district court's judgment giving Lett a sentence of only eleven days for seven different drug sales over a period of five weeks, totaling just over 60 grams of crack cocaine and just under 8 grams of powder cocaine. The government's contention is that the district court erred in using its Rule 35(a) authority to correct Lett's original five-year sentence, because its initial conclusion that Lett was not safety valve eligible was not an "arithmetical, technical, or other clear error" as required for use of the rule. As a fallback argument, which we need not reach, the government contends that even if the court were permitted to revisit its sentence under Rule 35(a), the resulting eleven day sentence was unreasonable.

Rule 35(a)'s single sentence provides: "Within 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error." Fed. R. Crim. P. 35(a). The district court did not claim, and Lett does not argue, that the court made an arithmetical or technical

error in imposing the original sentence of sixty months. Instead, the issue is whether the district court's initial decision that the safety valve guideline did not apply to remove the mandatory minimum provision in Lett's case was a "clear error."

The Criminal Rules Advisory Committee explained that what it meant by "clear error" was "acknowledged and obvious errors in sentencing." Fed. R. Crim. P. 35 advisory committee's notes (1991). The committee went on to add:

> The authority to correct a sentence under this subdivision is intended to be very narrow and to extend only to those cases in which an obvious error or mistake has occurred in the sentence, that is, errors which would almost certainly result in a remand of the case to the trial court for further action . . . . The subdivision is not intended to afford the court the opportunity to reconsider the application or interpretation of the sentencing guidelines or for the court simply to change its mind about the appropriateness of the sentence. . . .
>
> . . . .
>
> Rule 35(c) provides an efficient and prompt method for correcting obvious technical errors that are called to the court's attention immediately after sentencing.

Id.[1]

We quoted that language in United States v. Yost, 185 F.3d 1178 (11th Cir. 1999), and summarized it as meaning that "the district court may not simply change its mind, and any error to be corrected under that subsection must be obvious." Id. at 1181. We agreed with the district court in Yost that sentencing a defendant under what was obviously the wrong offense level guideline—one applicable to an offense for which the defendant had not been convicted—was clear error within the corrective reach of the rule. Id. at 1179–81.

The Criminal Rules Advisory Committee notes accompanying Rule 35(a) cite two decisions as examples of the kind of error that is clear enough for correction under it. Fed. R. Crim. P. 35 advisory committee's notes (1991). One is United States v. Rico, 902 F.2d 1065 (2d Cir. 1990), where an erroneous statement by the prosecutor and a typographical error in the presentence report had caused the court to impose a sentence different from the one the parties had agreed to in a court-accepted plea agreement. Id. at 1066. The court and both parties acknowledged at re-sentencing that the initial sentence was a mistake. See id. The Second Circuit concluded on appeal that the district court had "properly corrected its illegal sentence." Id. at 1068.

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[1] The provision now located in Rule 35(a) was in Rule 35(c) until it was moved as part of the 2002 amendments to the rule. Id. advisory committee's notes (2002).

The second example the advisory notes give of a proper application of the clear error standard of Rule 35(a) is United States v. Cook, 890 F.2d 672 (4th Cir. 1989). There, the district court initially sentenced the defendant to three months of community confinement followed by three months of supervised release, a sentence contrary to the guidelines and unlawful because supervised release is permitted only after a term of imprisonment. Id. at 674. The Fourth Circuit affirmed the correction of that sentence to a term of three months in prison followed by three months of supervised release. Id. at 674–75. In affirming, the court recognized that the authority of a district court to correct a sentence is narrowly confined, but characterized the case before it as an "unusual" one where the original sentence was "an acknowledged and obvious mistake" and unlawful. Id. at 675.

The Yost, Rico and Cook decisions trace out the boundaries of a narrow corrective power limited in scope to those obvious errors that result in an illegal sentence or that are sufficiently clear that they would, as the committee notes specify, "almost certainly result in a remand of the case to the trial court for further action." Fed. R. Crim. P. 35 advisory committee's notes (1991). In this case the district court did not sentence Lett under the wrong guideline, as in Yost; it did not impose a sentence different from the one in the plea agreement, as in Rico; and it did not impose a sentence that was illegal under the applicable guidelines and statutory provisions, as in Cook.

At most, the district court misunderstood the breadth of its discretion under the safety valve provisions of 18 U.S.C. § 3553(f) and U.S.S.G. § 5C1.2,

read in light of the Booker decision, causing the court to impose a sentence higher than it would have had it correctly gauged the law. Even so, the sentence the court did impose was plainly permissible under the guidelines and applicable statutes. We say "at most," because it is not clear that the district court's initial understanding of the scope of its discretion was mistaken. It is not obvious that the Booker decision eviscerated mandatory minimum sentences in every case where the defendant meets the five criteria for safety valve treatment, including those in which the advisory guideline range is above the mandatory minimum. That result would be the effect of adopting the theory on which the re-sentencing in this case is based.

When the Supreme Court did its remedial work on the sentencing scheme to save the guidelines from constitutional doom, Booker, 543 U.S. at 244–68, 125 S. Ct. at 756–69, it did not address this mandatory minimum, safety valve issue. The issue may be viewed as one of intent, and not just the congressional intent behind 21 U.S.C. § 841(b)(1)(B) and 18 U.S.C. § 3553(f), or the Sentencing Commission's intent behind § 5C1.2 of the guidelines, but also the intent behind the Supreme Court's reconstructive interpretation of the sentencing statutes in the remedial part of the Booker decision. It seems to us that the best approach to the merits of the post-Booker mandatory minimum issue would be to read the statutory and guidelines provisions and the Booker Court's restructuring work together and attempt to ascertain their meaning as though they were all statutory enactments.

We do not have occasion to do that in this case because the merits of the issue are not before us. Instead the issue before us is whether, at the time the district court entered its Rule 35(a) order, it was clear that the court had erred in its earlier conclusion that a sentence below the mandatory minimum was not permissible in the circumstances of this case. We are confident that conclusion was not clear error. Reasonable arguments can be made on both sides of the post Booker mandatory minimum issue, and we have no doubt that they will be. But arguable error is one thing, and clear error is another. Regardless of how this issue is ultimately determined on the merits, the sentence the district court initially imposed was not illegal, and any error was not of an acknowledged and obvious type, the kind that would "almost certainly result in a remand of the case to the trial court for further action." Fed. R. Crim. P. 35 advisory committee's notes (1991).

Indeed, the district court itself conceded that the answer to the post-Booker mandatory minimum question "certainly is not clear," and that there are few if any decisions from other courts that are useful in answering it. We agree with the district court that United States v. Cherry, 366 F. Supp. 2d 372 (E.D. Va. 2005), and United States v. Duran, 383 F. Supp. 2d 1345 (D. Utah 2005), are distinguishable because they involved guideline ranges below the minimum mandatory sentence.

We are not persuaded, as Lett argues, that either United States v. Lopez, 264 F.3d 527 (5th Cir. 2001), or United States v. Poyato, 454 F.3d 1295 (11th Cir. 2006), shows that an obvious error or mistake occurred when he was originally sentenced. Because

Lopez is not binding in this circuit, it would be unlikely to serve as a basis for concluding that any other result would be obvious error and would almost certainly result in vacating the sentence. The Lopez case is also distinguishable, because the applicable guidelines range there ended up being below the mandatory minimum level at the time the safety valve was to be applied. Lopez, 264 F.3d at 530. The Lopez decision did not address whether safety valve relief from a mandatory minimum sentence is available when the guidelines range is above that minimum sentence level.

Nor does our own Poyato decision resolve the matter. It contains wholly unremarkable statements about the post-Booker guidelines being advisory, and about proper sentencing involving applying the guidelines, considering the § 3553(a) factors, and setting a reasonable sentence below the statutory maximum. 454 F.3d at 1299. The actual holding in Poyato was that safety valve relief was properly denied because the defendant failed to meet one of the five prerequisites for it (he had possessed a firearm during the commission of the crime). Id. at 1298–99. Not only that but as in Lopez, the Poyato defendant's advisory guideline range was below the statutory minimum. See id. at 1296. Therefore, Poyato did not present the issue of whether the safety valve can have any application where the guidelines range is above the statutory minimum. See United States v. Aguillard, 217 F.3d 1319, 1321 (11th Cir. 2000) (per curiam) ("The holdings of a prior decision can reach only as far as the facts and circumstances presented to the Court in the case which produced the decision." (quotation marks and citation omitted)). For that reason any statements touching on this

issue would be no more than dicta anyway. See Aron v. United States, 291 F.3d 708, 716 (11th Cir. 2002) (Carnes, J., concurring) ("All that is said which is not necessary to the decision of an appeal given the facts and circumstances of the case is dicta.").

At oral argument, Lett's present counsel (who did not represent him in the district court) invited us to import into the Rule 35(a) "clear error" measure the plain error standard of Rule 52(b), as interpreted and applied in countless decisions. The invitation is logically appealing because the narrow purpose of Rule 35(a) dovetails nicely with the scope of the plain error rule. Before an error is subject to correction under the plain error rule, it must be plain under controlling precedent or in view of the unequivocally clear words of a statute or rule; it must have adversely affected the outcome of the proceedings; and it must be such that the failure to correct it would seriously affect the fairness, integrity or public reputation of judicial proceedings. United States v. Olano, 507 U.S. 725, 732–37, 113 S. Ct. 1770, 1776–79 (1993); United States v. Rodriguez, 398 F.3d 1291, 1298 (11th Cir. 2005). If an error meets all those requirements, it is also the kind of obvious error that "would almost certainly result in a remand of the case to the trial court for further action" and would therefore come within the narrow scope of Rule 35(a). Fed. R. Crim. P. advisory committee's notes (1991). As a margin note here, we point out that the Supreme Court has described the plain error rule with language that sounds like the Rule 35(a) "clear error" standard. In the Olano opinion, for example, the Court said that the "plain" in plain error "is synonymous with 'clear' or, equivalently, 'obvious.'" 507 U.S. at 734, 113 S. Ct. at 1777.

All this may be well and good, but it does not help Lett. For the same reasons that the district court's view of the mandatory minimum requirements in light of the safety valve provisions is not an obvious error or mistake that almost certainly would have caused the sentence to be overturned on appeal, it is not plain error. See United States v. Castro, 455 F.3d 1249, 1253 (11th Cir. 2006); United States v. Lejarde-Rada, 319 F.3d 1288, 1291 (11th Cir. 2003); United States v. Humphrey, 164 F.3d 585, 588 (11th Cir. 1999).

IV.

We agree with the district court's recognition that the proper resolution of the mandatory minimum and safety valve issue that prompted its Rule 35(a) modification of Lett's sentence is not clear. There is no decision on point from any court, and reasonable people could differ about the matter. That means the court's initial understanding was not "an obvious error or mistake . . . which would almost certainly result in a remand" if not corrected, which is the proper standard of clarity under the rule. Fed. R. Crim. P. 35(a) advisory committee's notes (1991). The district court used Rule 35(a) to take another stab at interpreting the applicable statutory and guideline provisions in light of the Booker decision, and the committee notes forbid use of the rule for that purpose. Id. (The rule "is not intended to afford the court the opportunity to reconsider the application or interpretation of the sentencing guidelines.").

We do not question the district court's good faith in attempting to work its way through the problem, and we are not unsympathetic to its desire to give Lett a sentence less than the mandatory minimum.

Our review, however, is de novo, and our reading of Rule 35(a) requires that we vacate the court's order re-sentencing Lett and remand the case with instructions that it impose the original sentence of sixty months to run concurrently on each count.

JUDGMENT VACATED AND REMANDED WITH INSTRUCTIONS.

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA

VS.

PATRICK LETT

CRIMINAL NO. 05-00266-WS

ORDER AMENDING SENTENCE

On April 13, 2006, Defendant Patrick Lett appeared before the undersigned for a sentencing hearing. At the conclusion of the hearing, following consideration of the testimony presented, argument of counsel, and consideration of the information contained in the Pre-Sentence Report (PSR), the Court sentenced Defendant to a term of imprisonment for 60 months concurrent in each of the seven counts of the indictment to which Defendant entered a plea of guilty. As stated on the record during the hearing, the term of 60 months was chosen because that term represents the mandatory minimum sentence prescribed by Congress in 21 U.S.C. § 841(b)(1)(B), the statute violated by Defendant as charged in counts 8-12 of his indictment. Pursuant to Fed.R.Crim.P. 35(a) and for the reasons set forth below, the Court now *sua sponte* reconsiders the sentence imposed.

At issue in this Court's reconsideration of Defendant's sentence, is the application of U.S.S.G. § 5C1.2 ("the safety valve") and the effect of that provision on Defendant's sentence given his somewhat unique circumstances. Perhaps the

appropriate starting point in this discussion is with the PSR and by noting that neither the Defendant nor the Government filed any objection to the contents of the PSR prior to the sentencing hearing. As a result, this Court adopted the PSR and determined that the sentencing guidelines calculations contained therein were accurate. See *United States v. Moriarty*, 429 F.3d 1012, 1021 (11th Cir. 2005) (holding that "even in the post-Booker era, district courts still have the obligation to calculate the applicable Guidelines range accurately."). The PSR advised, and the Court found, again without objection, that Defendant qualified for consideration of the safety valve because Defendant met all of the criteria found in § 5C1.2. Therefore, included in the Court's calculation of the Defendant's offense level was a two-level reduction as allowed pursuant to § 2D1.1(b)(1) of the Sentencing Guidelines. (PSR, paragraph 40). Taking into account all of the factors required for an accurate calculation of the Guidelines, the Court determined that Defendant possessed a total offense level of 27,[1] with a criminal history category of I, producing a Guidelines range of imprisonment of 70 to 87 months. The effect of that range of punishment on the application of the safety valve is addressed in paragraph 76 of the PSR which states as follows:

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[1] Because Defendant admitted that he possessed with intent to distribute 60.42 grams of crack cocaine and 7.89 grams of powder cocaine, his base offense level started at level 32. (PSR, paragraph 38). After applying all appropriate adjustments, his total offense level resulted in a level 27.

> Counts 8, 9, 10, 11, and 12, each carry a mandatory minimum penalty of 60 months. Although it appears that the defendant is eligible for consideration under U.S.S.G. § 5C1.2, because the minimum of the guideline range is 70 months, which is greater than the statutory mandatory minimum 60 months, 5C1.2 consideration is a moot issue.

As noted above, there was no pre-hearing objection to this provision in the PSR. Nor did Defendant object to the Court's adoption of this provision.

The Court, mindful of the Eleventh Circuit's directive that the sentencing court is obligated to accurately calculate the Guidelines, and mindful of the language of § 5C1.2 which provides that "the court shall impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence," reasoned that because of Defendant's circumstances, an accurate calculation of the Guidelines produced a result which denied him the benefit of the safety valve.

It should be noted here that, in the pre-*Booker* world of sentencing, this Court has consistently denied other Defendants benefit of the safety valve where the guidelines range was calculated to be above the mandatory minimum. The basis for this result is the Court's belief that § 5C1.2 creates two subsets of Defendants; those whose guidelines sentences are above the mandatory minimum, and those Defendants whose guidelines sentences are below the mandatory minimum. It is this Court's interpretation of that provision that compelled it to

conclude that only those Defendants whose guidelines sentences fell below the mandatory minimum were entitled to application of that part of the safety valve which authorizes the Court to impose a sentence below the mandatory minimum. Otherwise, § 5C1.2 makes no sense. In other words, how could the Court impose a sentence "in accordance with the applicable guidelines without regard to any statutory minimum sentence" if the applicable guidelines range is above the mandatory minimum? Any sentence imposed below the mandatory minimum in such a case necessarily would be outside the applicable guidelines, leaving the Court with no guidelines at all. Moreover, had Congress and the Sentencing Commission intended that any safety valve-eligible Defendant, regardless of that Defendant's projected guidelines sentence range, be qualified for a lower than mandatory minimum sentence, they could have said so. But Congress and the Sentencing Commission did not say so. In fact, a reasonable interpretation of § 5C1.2 compels a conclusion that the language "in accordance with the applicable guidelines" imposes an additional criterion that a Defendant must meet in order to qualify for a sentence below the mandatory minimum. That is, the Defendant must have a projected guidelines sentence below that minimum.

Now, what does all of this mean in the post-*Booker* world? The answer certainly is not clear, because there is little or no guidance from the courts of appeal or even from sister courts throughout the country. Those courts who have addressed the application of the safety valve in the post-*Booker* environment appear not to have had factual

circumstances similar to the case at hand. *See e.g., United States v. Cherry*, 366 F.Supp.2d 372 (E.D. Va. 2005), *United States v. Duran*, 383 F.Supp.2d 1345 (D.Utah 2005). Both *Cherry* and *Duran* involved guidelines ranges below the mandatory minimum.

In the pre-Booker mandatory guidelines world, given the facts of this case, and given this Court's practice with regard to the application of the safety valve, it is clear that Defendant Lett would have received a sentence in the range of 70 to 87 months. In the post-*Booker* advisory guidelines world, what now are the options available to this Court where, as here, the Defendant satisfies all five conditions of § 5C1.2? The Court concludes, assuming that sentencing factors justify, this Court could exercise its discretion in imposing a non-guidelines (variance) sentence above the guidelines range, a sentence within the guidelines range, a sentence below the guidelines range but no lower than the mandatory minimum, or a sentence below the guidelines range and below the mandatory minimum.

In Defendant Lett's case, the Court determined and found during the sentencing hearing that other sentencing factors contained in 18 U.S.C. § 3553(a) compelled a conclusion that Defendant Lett was entitled to a non-guidelines sentence (variance). Those reasons were substantially stated on the record and will not be repeated here. However, because the Court found that an accurate calculation of the Guidelines produced a sentencing range above the mandatory minimum, and because of the Court's interpretation of the provisions of § 5C1.2, the Court reasoned that the limit of the Court's discretion in sentencing was bounded by the statutory mandatory

minimum of 60 months. As stated on the record, and for the reasons given, the Court exercised what it believed to be its limited discretion and set Defendant Lett's sentence at 60 months. The Court now concludes that, in this post-*Booker* era, its interpretation of § 5C1.2 is overly restrictive and Defendant Lett is entitled to be re-sentenced.

As stated on the record during the sentencing hearing, this Court found that, after applying the appropriate sentencing factors found in 18 U.S.C. 3553(a), Defendant was entitled to a non-guidelines (variance) sentence. Now, having reconsidered application of the safety valve provisions, in light of the now advisory guidelines scheme, this Court finds that its discretion in sentencing is not limited as previously believed and as discussed above. Stated differently, the Court finds that when all five conditions of § 5C1.2 are satisfied, the Defendant is safety valve eligible and the Court's sentencing discretion is not bounded by a statutory mandatory minimum sentence, irrespective of whether the accurately calculated advisory guidelines sentencing range is above or below that mandatory minimum. The Court's statements to the contrary at the sentencing hearing were error. Given all of the sentencing factors discussed on the record during the sentencing hearing which include Defendant's limited role in the offense which, for his part, extended over a period of little more than a month, Defendant's voluntary withdrawal from that criminal enterprise followed by his re-enlistment in the U.S. Army where he remained on active duty until the time of his arrest on the present charges on October 17, 2005, Defendant's lack of criminal history, and Defendant's unblemished and significant 17 year career in the

U.S. Army including two tours of duty in Iraq, this Court exercises its discretion to re-sentence Defendant as follows:

Pursuant to the Sentencing Reform Act of 1984, and upon consideration of all of the sentencing factors found in 18 U.S.C. § 3553(a) as articulated on the record during the original sentencing hearing, and in light of the matters discussed above, it is the judgment of the Court that Defendant, Patrick Lett, is hereby sentenced to the time he has now served in the custody of the United States Bureau of Prisons. That sentence is imposed as to each of counts 5, 7, 8, 9, 10, 11, and 12, and said terms are considered to have been served concurrently.

Upon release from imprisonment pursuant to this order, Defendant shall be placed on supervised release for a term of three years on each of counts 5 and 7, and 5 years on counts 8, 9, 10, 11, and 12, all such terms to run concurrently. Defendant shall abide by the terms and conditions of supervised release as previously imposed during the sentencing hearing on April 13, 2006. Within 72 hours of release from custody, Defendant shall report in person to the Probation Office in the Southern District of Alabama.

The Court finds that the sentence imposed addresses the seriousness of the offense, and a sentencing objectives of punishment, deterrent, and incapacitation, and constitutes a reasonable sentence following consideration of the sentencing factors found in 18 U.S.C. 3553(a).

All of the other terms, conditions, and orders entered during the sentencing hearing remain in effect.

DONE and **ORDERED** this 24th day of April, 2006.

s/WILLIAM H. STEELE

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA

UNITED STATES OF AMERICA
V.
PATRICK LETT

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On Or After November 1, 1987)

CASE NUMBER: 1:05-CR-00266-003-WS
USM NUMBER: 09226-003

THE DEFENDANT: Glenn Gerard Cortello

Defendant's Attorney

(X) pleaded guilty to count(s) Five, Seven, Eight, Nine, Ten, Eleven and Twelve of the Indictment.

( ) pleaded nolo contendere to count(s) which was accepted by the court.

( ) was found guilty on count(s) after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Date Offense Count

Title & Section/Nature of Offense/Date Offense Concluded/Count No.(s)

21:841(a)(1): possession with intent to distribute crack cocaine; 2/24/2004 ; five counts.

21:841(a)(1): possession with intent to distribute crack cocaine; 3/1/04; seven counts.

21:841(a)(1): possession with intent to distribute Cocaine; 3/3/04; eight counts.

21:841(a)(1): possession with intent to distribute Cocaine; 3/10/04; nine counts.

21:841(a)(1): possession with intent to distribute crack cocaine; 3/17/04; ten counts.

21:841(a)(1): possession with intent to distribute crack cocaine; 3/24/04; eleven counts.

21:841(a)(1): possession with intent to distribute crack cocaine; 4/1/04; twelve counts.

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

( ) The defendant has been found not guilty on count(s) .

(X) **Count(s) One is dismissed on the motion of the United States.**

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

April 13, 2006
Date of Imposition of Judgment

s/WILLIAM H. STEELE
UNITED STATES DISTRICT

JUDGE
April 24, 2006
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total **term** of **TIME SERVED as to each of Counts Five, Seven, Eight, Nine, Ten, Eleven and Twelve and said terms are considered to have been served concurrently.**

() Special Conditions:

() The court makes the following recommendations to the Bureau of Prisons:

(X) The defendant is remanded to the custody of the United States Marshal.

() The defendant shall surrender to the United States Marshal for this district:

() at a.m./p.m. on .

() as notified by the United States Marshal.

() The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

() before 2 p.m. on .

() as notified by the United States Marshal.

() as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____ with a certified copy of this judgment.

UNITED STATES MARSHAL

By_____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **THREE (3) YEARS as to each of Counts Five and Seven; and FIVE (5) YEARS as to each of Counts Eight, Nine, Ten, Eleven and Twelve; said terms to run concurrently, for a total supervised release term of FIVE (5) YEARS**.

(X) Special Conditions: **the defendant shall participate in a program of testing and treatment for drug and/or alcohol abuse as directed by the Probation Office.**

For offenses committed on or after September 13, 1994: The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at

least two periodic drug tests thereafter, as directed by the probation officer.

() The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable)

() The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable)

() The defendant shall participate in an approved program for domestic violence. (Check, if applicable)

(X) **The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.**

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment. The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

The defendant shall comply with the standard conditions that have been adopted by this court

(Probation Form 7a).

The defendant shall also comply with the additional conditions on the attached page (if applicable).

See Page 4 for the "STANDARD CONDITIONS OF SUPERVISION"

SUPERVISED RELEASE

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;

14) the defendant shall cooperate, as directed by the probation officer, in the collection of DNA, if applicable, under the provisions of 18 U.S.C. §§ 3563(a)(9) and 3583(d) for those defendants convicted of qualifying offenses.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

Assessment/Restitution

Totals: $700.00; $100.00 as to each of Counts Five, Seven, Eight, Nine, Ten, Eleven and Twelve

() The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such a determination.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below. **(or see attached)** However, pursuant to 18 U.S.C. § 3644(i), all non-federal victims must be paid in full prior to the United States receiving payment.

() The defendant shall make restitution to the following payees in the amounts listed below.

Name(s) and Address(es) of Payee(s)/Total Amount of Loss/Amount of Restitution Ordered/Priority Order or % of Payment

TOTALS: $_____ $_____

() If applicable, restitution amount ordered pursuant to plea agreement. $

() The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default, pursuant to 18 U.S.C. § 3612(g).

() The court determined that the defendant does not have the ability to pay interest and it is ordered that:

() The interest requirement is waived for the () fine and/or () restitution.

() The interest requirement for the () fine and/or () restitution is modified as follows:

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A (X) Lump sum payment of **$ 700.00** due immediately, balance due () not later than , or () in accordance with () C, () D, () E or () F below; or

B () Payment to begin immediately (may be combined with () C, () D, () E or () F below); or

C () Payment in (e.g., equal, weekly, monthly, quarterly) installments of $ over a period of (e.g., months or years), to commence (e.g., 30 or 60 days) after the date of this judgment; or

D () Payment in (e.g., equal, weekly, monthly, quarterly) installments of $ over a period of (e.g., months or years), to commence (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E () Payment during the term of supervised release will commence within (e.g., 30 or 60 days) after release from imprisonment. The court will set the

payment plan based on an assessment of the defendant's ability to ay at that time; or

F () Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are to be made to the clerk of court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

() Joint and Several:

() The defendant shall pay the cost of prosecution.

() The defendant shall pay the following court cost(s):

() The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment; (2) restitution principal; (3) restitution interest, (4) fine principal; (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

* *

UNITED STATES OF AMERICA ,

VS.

PATRICK LETT

Defendant.

* *

Criminal No.: 05-0266-WS
April 13, 2006
Courtroom 2A
U.S. Federal Courthouse
Mobile, Alabama

SENTENCING HEARING
BEFORE THE HON. WILLIAM H. STEELE
UNITED STATES DISTRICT JUDGE
APPEARANCES

For The Government: John G. Cherry, Jr., Esq.
Assistant U.S. Attorney
U.S. Attorney's Office
63 S. Royal Street
Suite 600
Mobile, Alabama 36602

For The Defendant:	Glenn G. Cortello, Esq. Attorney at Law 711 Washington Street Alexandria, LA 71301
Court Reporter:	Mary Frances Giattina, RDR/CRR Official Court Reporter P. O. Box 3021 Mobile, AL 36652-3021 (251) 690-3003

Proceedings reported by machine stenography.

Transcript produced by computer.

MARY FRANCES GIATTINA, RDR, CRR, OFFICIAL COURT REPORTER P. O. BOX 3021, MOBILE, ALABAMA 36652 (251) 690-3003

(April 13, 2006, 2:10 p.m.) (In open court.)

(Defendant present with counsel.)

THE COURT: Good afternoon.

MR. CHERRY: Good afternoon.

MR. CORTELLO: Good afternoon, Judge.

THE CLERK: We're here for a sentencing in the case of United States versus Patrick Lett, Criminal Case Number 05-266. What says the Government?

MR. CHERRY: The United States is ready, Your Honor.

THE CLERK: And what says the Defendant?

MR. CORTELLO: Defendant is ready.

THE COURT: All right. Come on up, please. Let me get you to come forward, if you would, please, sir.

(Brief pause.)

THE COURT: Sgt. Lett, let me get you to stand right here in front of the microphone. If you would raise your right hand and take an oath -- this microphone right there on the table.

(The Defendant was placed under oath.)

THE COURT: All right. Would you state your name for the record, please.

DEFENDANT: Patrick O'Neal Lett.

THE COURT: All right. We're here today for a sentencing hearing following entry of a guilty plea on December 30, 2005, to Counts Five, Seven, Eight, Nine, 10, 11, and 12 of an indictment charging possession with intent to distribute cocaine and

crack cocaine. The plea was entered subject to a written plea agreement.

The Presentence Report has been published in this case, and Mr. Cortello, I would assume that you received a copy of it and had a chance to discuss it with Mr. Lett?

MR. CORTELLO: Yes, sir, I did. And we have no objection to it.

THE COURT: All right. And Sgt. Lett, do you understand what's contained in the Presentence Report?

DEFENDANT: Yes, sir, Your Honor.

THE COURT: I note that there are no written objections filed to the Presentence Report. Does anyone have anything to offer with regard to the contents of the report at this time?

MR. CORTELLO: No, sir.

MR. CHERRY: No, sir.

THE COURT: Mr. Cherry? All right. Then the Court will adopt the Presentence Report as published, reflecting a base offense level of 32. There's a two-level reduction for application of the safety valve, a three-level reduction for acceptance of responsibility, producing an adjusted offense level of 27.

Sgt. Lett has zero criminal history points, placing him in a Criminal History Category I, and that generates a guideline range of 70 to 87 months.

Is that everyone's understanding of the application of the Guidelines?

MR. CORTELLO: Yes, Your Honor.

MR. CHERRY: Yes, sir, Your Honor.

THE COURT: All right. Mr. Cortello, do you want to be heard on Sgt. Lett's behalf at this time?

MR. CORTELLO: Yes, sir. At this time, I would call Capt. Michael Iannuccilli. And his last name is I-a-n-n-u-c-c-i-l-l-i.

THE COURT: Come on up, Captain, if you would. Good afternoon.

CAPT. IANNUCCILLI: Afternoon, sir.

THE COURT: All right. Do you want to ask questions or you just have a statement to make?

MR. CORTELLO: I can go ahead and let him speak from his heart.

THE COURT: All right.

CAPT. IANNUCCILLI: Sir, first of all, I also brought my First Sergeant, Sgt. Lett's platoon sergeant, and another senior NCO from my company, none of which are in uniform today.

I want everyone in the courtroom to understand that I'm not here representing the military. I have no basis to speak on behalf of the United States Army. I'm here as his commander, and the other representatives here are to speak on their behalfs -- or on his behalf in their respective positions.

Sir, I've known Sgt. Lett for 12 months, four days. I met him the day I deployed from Afghanistan on a one-year tour. I found myself in direct responsibility of Sgt. Lett. He immediately proved to be an outstanding NCO and soldier, never failed to impress me with his motivation and dedication to the mission.

I was his direct supervisor for roughly four months, at which time I found out I would take

command of the unit. He immediately began giving me advice from the NCO's perspective on what soldiers need. I found his advice invaluable to me over the past nine months in command.

While under my direct supervision, he was always the first one into our office and the last one out, never leaving until the mission was complete, regardless of how late he was there.

During our time over the past 12 months, he has taken troubled soldiers under his wing, given them advice and tried to steer them in the right direction, talked with soldiers who had received administrative punishment under my command about how to get themselves on the right track, make amends with what they've done and correct their ways.

MR. CORTELLO: Did he mentor any of your soldiers?

CAPT. IANNUCCILLI: Yes, he did. As I said, he was consistently on the lookout for soldiers who were heading down the wrong path and gathering them up and trying to push them into the right direction.

I know Sgt. Lett to be a patriot, father, and a good man, and I know that those are his three primary motivators in life. I've talked to him to lesser or greater degrees on all those aspects. I can say that of the 31 NCO's in the rank of sergeant that I -- that I currently command, he is in the top ten percent of those NCO's.

He displays daily the Army values. For those of you unfamiliar, they spell out the acronym leadership. It's loyalty, duty, respect, selfless service,

honor, integrity, personal courage. Often, it's thought f as a tag line in the military, and it's not taken as seriously as it should be. Under the 12 months I've known Sgt. Lett, he has exemplified the Army values.

Sir, I have limited knowledge on the charges he is – he has pled guilty to. I understand them in the context of what Mr. Cortello has shown me. I don't understand the circumstances under which they occurred. I'm not here to talk about that today. I'm here as a character witness for Sgt. Lett.

I could not be happier with his performance in my company. I would gladly deploy to Iraq with him and entrust my life to him. I'd trust my soldiers' lives to him. He's been nothing but an exemplary soldier for the past 12 months.

Sir, I implore you to reduce the sentence to as light as you possibly can. He continues to be a patriot to serve his nation, and he's expressed to me that is his sole desire is to continue on as a soldier in the United States Army. That's all I have, sir.

THE COURT: All right. Mr. Cherry, do you have any questions of the Captain?

MR. CHERRY: No, sir.

THE COURT: All right. Thank you, Captain.

CAPT. IANNUCCILLI: Yes, sir.

MR. CORTELLO: First Sgt. Daniel Sheward. And his last name is S-h-e-w-a-r-d.

THE COURT: Good afternoon.

FIRST SGT. SHEWARD: Good afternoon, sir. Sir, I'd like to say today that Sgt. Lett is an excellent soldier and a role model for all the noncommissioned officers and other soldiers in the unit. I've worked

directly with Sgt. Lett over the past eight months, and at which time we picked Sgt. Lett to do a job in the unit which is -- works directly for the commander as a unit supply sergeant. He was picked over by 30 other soldiers, and it is probably one of the most important jobs in the unit, sir, and which he doesn't – that isn't his correct MOS, but he took that job because of his leadership abilities.

While working with Sgt. Lett, he has demonstrated all the Army values, as the Captain already said. I've known on many occasions where a soldier has been knocked down for whatever reason, done something wrong, and as soon as I look away and I look back over, Sgt. Lett is over there picking that soldier up and trying to lead him to try to do the right thing, sir.

He has demonstrated an excellent work ethic in putting in numerous hours before and after. Even if it's something that I don't task Sgt. Lett with, if he has a knowledge of it, he'll stay there until that mission is accomplished. And usually, he'll call me late hours of the night when it's done to let me know that it's finished.

As a First Sergeant, I sleep well at night knowing that Sgt. Lett is on the mission because I know that no matter what the cost, he will get the mission accomplished. If every soldier in the military was like Sgt. Lett, it would be a better place.

And Your Honor, Sgt. Lett is an excellent soldier who would best serve his fellow man and his country by continuing with the United States Army. Sgt. Lett has admitted his guilt, and I just ask you to think of him needing us and us needing him.

Thank you, sir.

THE COURT: Mr. Cherry, any questions?

MR. CHERRY: No, sir.

THE COURT: Okay. Thank you.

MR. CORTELLO: Sgt. Tamisha Daggs, D-a-g-g-s. The first name is Tamisha, T-a-m-i-s-h-a.

THE COURT: Good afternoon.

SGT. DAGGS: Good afternoon. Sir, I'm here to Speak on Sgt. Lett's behalf. Sgt. Lett is an outstanding soldier. He's hard-working and dedicated. His hard work and dedication has motivated many soldiers to strive for excellence.

Sgt. Lett is -- he has the ability to accept his mistakes and mentor others and keep them from making that same mistake. He's a vital asset not only to my company but to the United States Army, sir.

Sgt. Lett makes my job a lot easier. When we get young soldiers in, he mentors them not only with the military life but how to adapt to a way of life. He's an outstanding soldier, sir.

MR. CORTELLO: Thank you.

THE COURT: Thank you.

MR. CORTELLO: Sgt. Lett, would you like to allocute at this time, make a statement to the Court?

DEFENDANT: Yes. Your Honor, I'm here today to ask you to give me an opportunity to continue serving this country. I came from -- I went to Iraq in 2003, April of 2003. I had less than three days left in the military before I deployed to Iraq. My country called upon me to go to Iraq with three days left in the military, and I didn't refuse.

During my time in Iraq, I went through some changes. I saw a lot of things. And I've seen a lot of things in two wars, but this war, I saw some very, very strange things that happened. I lost some friends, several friends, and I seen several comrades get killed.

I came home on December the 20th. I got out of the military December the 20th, and I made it home January the 22nd. During the time I got home, there was a lot of issues I had to deal with. Yes, the military offered counseling to soldiers who have been to war, but at the time, I was just ready to get home and see my kids and my family. I lost my dad -- at the time, my dad was dying. I lost my fiancee. I was dealing with the issues of my kids, trying to see how can I provide for my kids and to be a good father. I started drinking real heavy during that time, and I just felt like the lowest person on the face of the earth.

At the time, there was a mistake made, Your Honor. And that mistake was made, and I accept responsibility for that mistake. But the pressure that was upon me, I don't think anyone can fathom that because it's me, it was my emotions that I was dealing with internally.

After the mistake was made, I realized that it takes a cruel-hearted person to actually take advantage of someone who has a disease, and that disease is addiction. My 17 years, I decided to get on my knees and pray a little harder and ask God to pull me back together, in which he did. I wrote to my congressman and asked him to assist me in getting back into the military. At that time, I rejoined the military.

This offense occurred over two years ago. It happened for a short period of time, but the remainder of the time that I was home, I was doing what's right this time to be a good father and taking care of my dad and my kids and my mother.

My mother is -- my mom is 54 years old. My daughter is 16 and pregnant. I have a 13-year-old daughter, and I have a six-year old daughter, and my family depends on my income. That's why I rejoined the military, not to run away from anything, because when I put this uniform on, it's with pride and respect and unity and honor and knowing that I'm serving this country. That's why I've been in the military for 17 years, Your Honor.

I'm asking you as a man with kids, my mother will not be able to take care of my daughter who is pregnant right now. There is no way possible. She's a good mom, and she's there for my kids. She gets a large portion of my money from the military each month.

I apologize to -- I've asked God numerous occasions, numerous occasions to forgive me. And in my heart I know He has, because we all make mistakes. That's the point of learning from your mistakes. And when you can learn from your mistakes, it makes you a better person.

I was placed in this position because of my desperation for something. I wasn't out there trying to be some big-time drug dealer. Ain't no way, Your Honor. That's not my lifestyle. That's not what my life is about, never has been.

After 17 -- after being away from home for seven months and coming home, I found like someone saw me in a desperate situation and took advantage

of me. That's how I look at being put in that position. But I was man enough to walk away from it and go back into the military, in which I've been back in the military now for 17 months, and I haven't made any mistakes at all, Your Honor.

MR. CORTELLO: How long have you been in the military overall?

DEFENDANT: I've been in the military for 17 years, 17 years. I've been in Desert Storm and I went to Iraq, Iraqi Freedom. I'm asking Your Honor to let me try to continue my career and to take care of my family. That's the most important thing is taking care of my mom and my kids and serving this country.

THE COURT: All right.

MR. CORTELLO: Would you answer any questions the Prosecutor has for you, please?

THE COURT: Mr. Cherry, do you have anything?

MR. CHERRY: If I could, just a couple, Your Honor.

THE COURT: Sure.

EXAMINATION

BY MR. CHERRY:

Q. Sgt. Lett, you said someone took advantage of you when you came home?

A. I feel like I was put in a position to be taken advantage of, Mr. Cherry.

Q. Who did that?

A. Michael Lett, sir.

Q. Mike Lett?

A. Yes, sir.

Q. And how did he do that to you?

A. I had a truck, a Jeep.

Q. I'm sorry?

A. I had a Jeep truck that the transmission had broke. And at the time, I had borrowed some money from Michael. And he asked me -- seven years away, I don't know anything about on how to deal with stuff like that. And he asked me to deliver a package, or pass a package off to him.

Q. He asked you to deliver a package or packages?

A. To pass it off, basically, sir.

Q. Okay. Now, you pled guilty to seven counts of dealing crack cocaine to undercover officers, right?

A. Yes, sir.

Q. And was Michael Lett with you on any of those occasions making you do that?

A. No, sir.

Q. What is your MOS, your military occupational specialty?

A. I'm a 92 Alfa, sir.

Q. You're in supply?

A. Yes, sir.

Q. And that's what you do right now?

A. I'm working at -- I was working in the motor pool, but I'm working right now as a 92 Yankee, sir.

Q. All right. And what were you doing in Iraq?

A. I was a 92 Alfa in 19 F scout company, sir.

Q. Whereabouts?

A. In Baghdad.

Q. In Baghdad? You were on a base?

A. We was at -- the first base we was at was Saddam War College. Then we moved from there to a place called the Teardrop, and we moved from there down into central Baghdad. And that's where we went to from there into the Palace.

Q. Saddam's Palace outside by the airport?

A. It's not too far from the airport, sir.

Q. Okay. That's a walled compound, isn't it?

A. That area is once you go in, but the missions are outside the compound, sir. I know it seems like what is 92 Alfa doing out on missions, but when you're in the service now, the Army is basically about every soldier being prepared for war.

Q. So, on February 24th, 2004, when you sold to the undercover officer, it was you selling, it wasn't Michael, Michael wasn't with you, was he?

A. (No audible response.)

Q. Let me ask you this: On these occasions, Mike wasn't standing there telling you you had to do this, was he?

A. No, sir.

MR. CHERRY: That's all I have, Your Honor.

THE COURT: Mr. Cortello, anything further?

MR. CORTELLO: Judge, I would just -- I have nothing further. I just had a comment I wanted to make, that obviously he has pulled himself up by his bootstraps and straightened his life out.

The month of March, 2004, April the 1st -- well, actually, it was from February 24th was the first offense to April the 1st of '04 was the last offense. He

was actually on the ground here in Alabama because he had gotten out of the military in December. So, he was on the ground until October.

But after April -- and of course, that investigation continued on, but he did pull himself up by the bootstraps, decided not to do that, realized that he had, that he had a little gem there, having been in the service for so long, and went back in to help his family obligations and straighten his life out. And he's done an exemplary job of being in the United States Army since then.

He has asked me, and I realize that there's a minimum mandatory five-year sentence under the statute, and it would be very hard for the Court to find a five-year sentence that's constitutionally excessive, but he has asked that I ask you to put him on supervised release or some kind of probation with the hopes of him staying in the military. But I realize how hard that is to do, so I would ask the Court to give the minimum sentence possible.

THE COURT: Mr. Cherry, comments, argument?

MR. CHERRY: Your Honor, I too was in Iraq. We ran convoys up into Fallujah, Anaconda, Mosul. I too lost soldiers. I've sat in the back of airplanes in a cargo plane sitting beside a flag-draped coffin at 2:00 in the morning coming back with one of ours.

I didn't come back and sell drugs. It's no excuse. We got him on seven occasions. I don't know what else he might have sold. But I ask the Court to abide by the advisory guidelines.

MR. CORTELLO: Judge, I would just point out that he was mentoring soldiers to stay out of trouble

before he knew that -- before he ever knew that he was going to be arrested for these charges. That's all, Judge. Thank you.

THE COURT: All right. What I have before me, of course, is the decision to either apply the Guidelines which, as I've already announced, produce sentencing guideline range of 70 to 87 months, or I have what I perceive to be a motion to enter a non-guideline sentence. And then there is, I guess, an additional motion to determine that the mandatory minimum in this case is constitutionally excessive and to even go below the mandatory minimum.

In trying to fashion a reasonable sentence in this case, there are a lot of things that I have to consider. I have to consider, first of all, the application of the Guidelines and whether or not that sentence as now determined to be an advisory sentence produces a reasonable result.

I have to look at all of the information and all the factors that are available to me and required under Section 3553(a). And there are a number of factors that I have to consider, and some of which are the nature and circumstances of the offense.

Well, what we have here is not only one offense but we have seven separate counts of an indictment in which Sgt. Lett is charged with selling crack cocaine or powder cocaine to an undercover agent not once but on seven different occasions. And the quantity of the total amount of cocaine and crack cocaine under the Guidelines and as determined under the statute produce a sentence, as I said, of 70 to 87 months.

The statutory punishment available under Counts Five and Seven are up to 20 years, and

Counts Eight, Nine, 10, 11, and 12 carry punishment of five to 40 years. So, there's a mandatory minimum in this case of five years. That's the minimum sentence that could be imposed. Five years is theminimum sentence that could be imposed, and that's been directed by Congress.

The Sentencing Guidelines, as I indicated, produce a sentence higher than the mandatory minimum. So, any reduction under 70 months would require either a departure, which I don't have a motion for before me, or application of a non-guideline sentence.

So, again, considering the nature and circumstances of the offense, I've got an offense that Congress has determined to be serious. And the evidence in this case is strong. I don't think there's any question about it. These are undercover buys not to someone working for the Government as cooperating witness, but this is to a Federal agent.

However, I'm also supposed to consider the history and characteristics of the Defendant in combination with the nature and circumstances of the offense. And then once I consider those two factors, then I have to impose a sentence that reflects the seriousness of the offense, that will promote respect for the law, provide just punishment, afford adequate deterrence, protect the public from further crimes, and to provide the Defendant with the necessary correctional treatment in the most effective manner.

What I've got is a very unusual set of circumstances here. I don't normally see people standing before me in uniform. What I normally see are individuals who stand before me with significant

criminal histories, with little or no productivity to stand on in their lives, generally uneducated, unemployed, and individuals who have been in trouble with the law time and time again.

That's not the case with Sgt. Lett. I have someone who has a military career behind him, who since the advent of the offenses in February and March of 2004 has re-entered the military. And based on everything that I've seen in terms of the letters of recommendation and heard today from Sgt. Lett's Captain and First Sergeant and fellow soldier, there's every reason to believe that Sgt. Lett's contributions to the Army and to the military and, in turn, to this country have been substantial not only in terms of serving in time of war but serving in times of peace and serving, serving well.

And I note from the letters that I received that – which pretty much confirm what I heard today, that he's -- Sgt. Lett has been described as an extremely valuable asset to the United States Army, an outstanding NCO, a model soldier, a role model with excellent work ethic, a dynamic, innovative leader, a shining example for his peers and subordinates.

And in reviewing the fitness reports that I have available to me, his ratings have been good to excellent. And in the category of potential for promotion and to service in positions of greater responsibility, he was rated among the best.

There's little doubt that based on my military experience that a good NCO is of extreme value to the Army. So, I think Sgt. Lett is to be credited for his contributions to the United States Army, to his unit and, in turn, to this country.

The other factor that I can consider would be how his criminal conduct stands in relation to what has otherwise been an exemplary life up until the time of the offenses and even after. And it appears to me that the five or six weeks in 2004 in which Sgt. Lett chose to violate the law, and violate it in a very serious way, indicates what would otherwise be determined to be aberrant behavior. It was not typical of his training, apparently his upbringing and, for whatever reason, Sgt. Lett chose to violate the law during that period of time.

All of that said, and having considered all of that, it is my decision that a non-guideline sentence is appropriate under all the facts and circumstances. However, my discretion is limited by Congress, and my discretion is limited to the mandatory minimum in this case, which is five years. There is no way that I can legally go below that five-year mandatory minimum, even if I wanted to. So, discretion is limited by Congress, who has dictated that people who commit these kind of crimes shall serve no less than 60 months, or five years.

That being the case, pursuant to the Sentencing Reform Act of 1984, it's the judgment of this Court that you, Patrick Lett, are hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 60 months. This term consists of 60 months as to each of Counts Five, Seven, Eight, Nine, 10, 11, and 12, said terms to be served concurrently.

The Court recommends that you be imprisoned at an institution where a residential, comprehensive, substance abuse treatment program is available. And from -- and upon release from imprisonment, you

shall be placed on supervised release for a term of three years on each of Counts Five and Seven, and five years on Counts Eight, Nine, 10, 11, and 12, all such terms to run concurrently.

Within 72 hours of release from custody of the Bureau of Prisons, you shall report in person to the Probation Office in the district to which you are released. While on supervised release, you shall not commit any Federal, state, or local crimes, you shall be prohibited from possessing a firearm or other dangerous device, and shall not possess a controlled substance. In addition, you shall comply with the standard conditions of supervised release as recommended by the Sentencing Commission and on record with this Court.

The Court also orders that you comply with the following special condition of supervised release; that is, that you shall participate in a program of testing and treatment for drug and/or alcohol abuse as directed by the Probation Office.

The Court finds that you do not have the ability to pay a fine; therefore, no fine is imposed.

The Court finds that the sentence imposed addresses the seriousness of the offense and the sentencing objectives of punishment, deterrence, and incapacitation, and is determined to be a reasonable sentence as found by applying the factors under Section 3553(a).

It is ordered that you pay a special assessment in the amount of $100 on all seven counts for a total of $700, which is due immediately.

You can appeal your conviction if you believe that your guilty plea was somehow unlawful or

involuntary or if there's some other fundamental defect in the proceedings not waived your guilty plea. you also have a statutory right to appeal your sentence under certain circumstances, particularly if you think the sentence is contrary to law. In any case, you have the right to apply for leave to appeal in forma pauperis, and the Clerk of Court will prepare and file notice of appeal and appoint counsel to represent you upon your request. With few exceptions, any notice of appeal must be filed within ten days of the date of entry of judgment.

Anything further from the Government at this time?

MR. CHERRY: No, sir, Your Honor.

THE COURT: From the Defendant?

MR. CORTELLO: No, sir, Your Honor. Thank you for --

THE COURT: Probation, anything further we need to put on the record?

PROBATION OFFICER MORRIS NORTHCUTT: No, sir.

MR. CHERRY: Judge, I do move to dismiss Count One.

THE COURT: All right. That's right. There's aremaining count. Count One of the indictment is hereby dismissed on the Government's motion.

Is there a request for volantary surrender?

MR. CORTELLO: Yes, sir.

THE COURT: Any objection to voluntary surrender?

MR. CORTELLO: If he could report to the Bureau of Prisons and go directly to the prison facility.

MR. CHERRY: Can I have one moment, Your Honor?

THE COURT: Sure.

(Brief pause.)

MR. CHERRY: Your Honor, I'm not quite clear what Sgt. Lett's immediate status with the military is going to be. I know from talking with the JAG Corps, they -- he cannot stay in the Army. I'm not sure how soon that's going to take effect. I'm not sure what effect that will have on where he would stay, who would be in charge of him, who would make sure he voluntarily surrenders. I would ask for a detention until we can figure that out.

THE COURT: All right. How long do you think it will take to determine, make that determination?

MR. CHERRY: Probably the next five days. I've got to talk to the JAG folks.

THE COURT: All right. The request for voluntary surrender is denied at this time subject to reconsideration on -- after investigation of Sgt. Lett's status.

MR. CHERRY: Yes, sir.

THE COURT: Anything further?

MR. CHERRY: No, sir.

THE COURT: All right.

MR. CORTELLO: Thank you, Judge.

THE COURT: That's all. Good luck to you, Sgt. Lett.

(Proceedings concluded at 2:45 p.m. this date.)

CERTIFICATE

STATE OF ALABAMA)

COUNTY OF MOBILE)

I do hereby certify that the above and foregoing transcript of proceedings in the matter aforementioned was taken down by me in machine shorthand, and the questions and answers thereto were reduced to writing under my personal supervision, and that the foregoing represents a true and correct transcript of the proceedings upon said hearing.

I further certify that I am neither of counsel nor related to the parties to the action, nor am I in anywise interested in the result of said cause.

_____

Mary Frances Giattina, RDR, CRR
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(251) 690-3003

UNITED STATES CODE
TITLE 18 - CRIMES AND CRIMINAL PROCEDURE
PART II - CRIMINAL PROCEDURE
CHAPTER 227 - SENTENCES
SUBCHAPTER A - GENERAL PROVISIONS

§ 3553. Imposition of a sentence

(a) Factors To Be Considered in Imposing a Sentence.— The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress

(regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

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(f) Limitation on Applicability of Statutory Minimums in Certain cases.— Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

21 U.S.C. § 841(b)

(b) Penalties. Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving --

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of --

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-

phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4- piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 100 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 1 kilogram or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers; such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of

section 845, 845a, or 845b of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. For purposes of this subparagraph, the term "felony drug offense" means an offense that is a felony under any provision of this subchapter or any other Federal law that prohibits or restricts conduct relating to narcotic drugs, marihuana, or depressant or stimulant substances or a felony under any law of a State or a foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, or depressant or stimulant substances. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving --

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of --

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4- piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 10 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 100 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers; such person shall be

sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this

subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II , or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised

release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III, or 30 milligrams of flunitrazepam, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any

sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised

release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of Title 18.

(5) Any person who violates subsection (a) of this section by cultivating a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed --

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of Title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual; or both.

(6) Any person who violates subsection (a) of this section, or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use --

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water, shall be fined in accordance with Title 18, or imprisoned not more than five years, or both.

(7) Penalties for distribution.--

(A) In general.--Whoever, with intent to commit a crime of violence, as defined in section 16 of title 18, United States Code (including rape), against an individual, violates subsection (a) by distributing a controlled substance to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with title 18, United States Code.

(B) Definition.--For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to

appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 35. Correcting or Reducing a Sentence

(a) Correcting Clear Error. Within 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.

(b) Reducing a Sentence for Substantial Assistance.

(1) ***In General.*** Upon the government's motion made within one year of sentencing, the court may reduce a sentence if:

(A) the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person; and

(B) reducing the sentence accords with the Sentencing Commission's guidelines and policy statements.

(2) ***Later Motion.*** Upon the government's motion made more than one year after sentencing, the court may reduce a sentence if the defendant's substantial assistance involved:

(A) information not known to the defendant until one year or more after sentencing;

(B) information provided by the defendant to the government within one year of sentencing, but which did not become useful to

the government until more than one year after sentencing; or

(C) information the usefulness of which could not reasonably have been anticipated by the defendant until more than one year after sentencing and which was promptly provided to the government after its usefulness was reasonably apparent to the defendant.

(3) ***Evaluating Substantial Assistance.*** In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant's presentence assistance.

(4) ***Below Statutory Minimum.*** When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.

(c) "Sentencing" Defined. As used in this rule, "sentencing" means the oral announcement of the sentence.

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No. 07-1042

In the Supreme Court of the United States

PATRICK LETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that any error in the district court's initial conclusion about its sentencing discretion was not "clear error" subject to correction under Federal Rule of Criminal Procedure 35(a) because, as the district court acknowledged, the issue was a novel one as to which the proper answer was not clear.

2. Whether, after the court of appeals determined that the district court was without authority to amend its initial sentence under Rule 35(a), the court of appeals correctly remanded the case for reinstatement of the initial sentence.

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In the Supreme Court of the United States

No. 07-1042

PATRICK LETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-22a) is reported at 483 F.3d 782. The order of the district court amending its previously imposed sentence (Pet. App. 23a-30a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 2007. A petition for rehearing was denied on November 30, 2007 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on February 12, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Alabama, petitioner

was convicted of possessing with intent to distribute powder cocaine and crack cocaine, in violation of 21 U.S.C. 841 (2000 & Supp. V 2005). Pet. App. 2a, 31a-32a, 43a-44a. The district court sentenced him to 60 months of imprisonment. *Id.* at 59a. Shortly thereafter, the district court modified the sentence to time served, which was 11 days. *Id.* at 29a, 33a. The court of appeals vacated that modified sentence and remanded for reinstatement of the original sentence. *Id.* at 22a.

1. In 2004, following his discharge from the Army, petitioner joined a cocaine distribution conspiracy involving at least 14 other individuals and led by his cousin Michael. Pet. App. 4a-6a. On seven separate occasions during a five-week period in the Spring of 2004, petitioner sold crack or powder cocaine to or in the presence of an undercover agent. *Id.* at 4a-5a, 56a. The quantities involved in the sales ranged from one gram to approximately 14.5 grams, totaling 60.42 grams of crack cocaine and 7.89 grams of powder cocaine. *Id.* at 5a-6a. Petitioner left the conspiracy and reenlisted in the Army. *Id.* at 5a.

In 2005, petitioner was charged with seven counts of possessing with intent to distribute powder cocaine and crack cocaine, in violation of 21 U.S.C. 841(a)(1), and one count of conspiring to possess with intent to distribute powder cocaine and crack cocaine, in violation of 21 U.S.C. 846. Indictment 1-7. Petitioner reached a plea agreement with the government. He agreed to plead guilty to the possession counts and to waive his right to appeal or collaterally attack his sentence, with exceptions for a sentence above the statutory maximum or guideline range, a claim of ineffective assistance of counsel, or in the event of a future retroactive amendment to the Sentencing Guidelines. Plea Agmt. ¶¶ 2, 19-22. In

exchange, the government agreed to drop the conspiracy count and recommend a sentence at the low end of the applicable advisory Sentencing Guidelines range, as determined by the court. *Id.* at ¶¶ 16-17. The district court accepted petitioner's guilty plea. 12/30/2005 Order on Guilty Plea.

The Presentence Report calculated petitioner's base offense level as 32, which the PSR reduced to 27 as a result of a three-level adjustment for acceptance of responsibility and a two-level reduction through application of the safety valve under Sentencing Guidelines § 2D1.1(b)(7) (2005). See Pet. App. 44a.[1] Petitioner had a criminal history category of I, which combined with his offense level generated a Guidelines range of 70 to 87 months of imprisonment. *Ibid.* The PSR further stated that "[a]lthough it appears that the defendant is eligible for consideration under U.S.S.G. § 5C1.2, [which mandates that in certain circumstances the defendant be sentenced "in accordance with the applicable guidelines without regard to any statutory minimum sentence"] because the minimum of the guideline range is 70 months, which is greater than the statutory mandatory minimum 60 months, 5C1.2 consideration is a moot issue." *Id.* at 25a. Petitioner did not object to the PSR, either in writing or at the sentencing hearing. *Id.* at 25a, 44a.

At sentencing, the court determined that petitioner's advisory Guidelines range was 70 to 87 months of imprisonment. Pet. App. 44a. The court determined that the statutory minimum sentence for petitioner's offenses was 60 months of imprisonment. *Id.* at 57a; see 21

[1] In its order of April 24, 2006, the district court misidentified the relevant Guidelines provision as Section 2D1.1(b)(1). Pet. App. 24a. That subsection provides for an *increase* of two levels for use of a firearm.

U.S.C. 841(b)(1)(B). After considering the pertinent sentencing factors, the district court concluded that a sentence below the Guidelines range was appropriate, but determined that it could not impose a sentence below the statutory minimum. Pet. App. 59a. The court sentenced petitioner to concurrent sentences of 60 months of imprisonment on each count of conviction. *Ibid.* Although the court did not expressly rule on petitioner's motion for a sentence below the statutory mandatory minimum on the ground that a sentence at that level would be unconstitutionally excessive, *id.* at 56a, it stated that it had considered the sentencing factors set forth in 18 U.S.C. 3553(a) (2000 & Supp. V 2005) and determined that a 60-month sentence of imprisonment was "a reasonable sentence," *id.* at 60a, thus implicitly rejecting petitioner's constitutional argument.

Eleven days later, the district court filed an order in which it "*sua sponte* reconsider[ed] the sentence imposed" on petitioner and imposed a new sentence of time served. Pet. App. 23a, 29a.[2] In its order, the court stated that, upon further reflection, it believed petitioner to be eligible for a sentence below the statutory minimum pursuant to the "safety valve" provision of Sentencing Guidelines § 5C1.2(a). Pet. App. 23a. That provision, quoted above, reiterates the substance of 18 U.S.C. 3553(f), under which, if a defendant meets certain criteria, "the court shall impose a sentence pursuant to [the] guidelines * * * without regard to any statutory minimum sentence." It is undisputed that petitioner meets the statutorily prescribed criteria.

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[2] The court apparently acted in response to a letter sent to it by a friend of petitioner's who was a law student. Pet. App. 9a-10a. The record does not reflect any response to that letter by petitioner or the government. *Id.* at 10a.

In its order, the district court stated that it had originally sentenced petitioner according to the court's "consistent[]" application of Section 5C1.2 before this Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005). Pet. App. 25a. The district court explained that it had previously construed the Guidelines to preclude application of the safety valve "if the applicable guidelines range is above the mandatory minimum." *Id.* at 26a. That interpretation was compelled, the court had believed, by the text of Section 5C1.2, which requires that a below-statutory-minimum sentence be imposed "in accordance with the applicable guidelines." *Ibid.* Although petitioner had not objected to the PSR, which was premised on the same understanding, or otherwise objected to the court's determination that petitioner was not eligible for a sentence below the statutory minimum, the court invoked Federal Rule of Criminal Procedure 35(a) to consider *sua sponte* whether this Court's decision in *Booker* changed the proper analysis of Section 5C1.2. Pet. App. 24a, 26a.[3]

The district court started its discussion by acknowledging that the effect of *Booker* "certainly is not clear" and that "there is little or no guidance from the courts of appeal or even from sister courts throughout the country," none of which had addressed the issue in factually similar circumstances. Pet. App. 26a-27a. Although the court recognized that it was "clear" that petitioner would not have been eligible for a sentence below the statutory mandatory minimum "[i]n the pre-*Booker* mandatory guidelines world," the court concluded, without further explanation, that, after *Booker*, the safety

[3] Rule 35(a) provides that "[w]ithin 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error." Fed. R. Crim. P. 35(a).

valve provision allows a sentencing court to impose a sentence below the statutory minimum when the defined criteria are met even when the otherwise applicable Guidelines range, before any variance or departure, is above the statutory minimum. *Id.* at 27a. Finding that its initial views to the contrary "were error," *id.* at 28a, the court imposed a modified sentence of imprisonment for time served, which was 11 days. *Id.* at 29a. The court entered judgment in accordance with that sentence. *Id.* at 31a-40a.

2. The government appealed the sentence on the basis that the district court lacked the authority under Rule 35(a) to modify the originally imposed sentence on the basis of an "error" that the court admitted was "certainly * * * not clear," Pet. App. 26a, 28a, as well as on the ground that an 11-day term of imprisonment was unreasonable for the crimes of which petitioner was convicted. The government contended that the initial sentence did not result from an "arithmetical" or "technical" error and that any error in the district court's initial assessment of its sentencing discretion was not "clear." Gov't C.A. Br. 17; Gov't C.A. Reply Br. 3-4.

The court of appeals agreed and vacated the sentence. Pet. App. 3a-22a. Citing the advisory committee's notes to Rule 35 and decisions of several courts of appeals, the court stated that the district court's corrective power under Rule 35(a) is "limited in scope to those obvious errors that result in an illegal sentence or that are sufficiently clear that they would, as the committee notes specify, 'almost certainly result in a remand of the case.'" Pet. App. 16a (quoting Fed. R. Crim. P. 35 advisory committee's note (1991)). That standard was not satisfied here, the court held, because it was not clear that the district court's initial assessment of its sentenc-

ing discretion was wrong. *Id.* at 17a. The court explained that *Booker* did not address Section 3553(f) and that "[r]easonable arguments can be made on both sides" of the question whether, after *Booker*, Section 3553(f) allows a district court to sentence below a statutory minimum when the advisory Guidelines range is above that minimum. *Id.* at 17a-18a. The court of appeals did not decide that question, holding only that its proper resolution was not clear. *Id.* at 18a.

Because there was no "arithmetical, technical, or other clear error" underlying the district court's initial sentence, the court of appeals held that Rule 35(a) did not provide authority for the district court to change it. Pet. App. 21a. The court of appeals therefore vacated the district court's modification order and remanded for the district court to reinstate its original sentence of 60 months of imprisonment. *Id.* at 22a.

ARGUMENT

Petitioner seeks review of the court of appeals' holding that Federal Rule of Criminal Procedure 35(a), which permits a district court to correct a "clear error" in sentencing, provides authority for the district court to revise its sentence only on the basis of errors that are "obvious," Pet. App. 21a (quoting Fed. R. Civ. P. 35 advisory committee's note (1991)). That holding is correct, and it does not conflict with any decision of this Court or another court of appeals. Further review of petitioner's claim is therefore unwarranted.

1. Petitioner argues (Pet. 24) that any "legal error that has a consequential impact on the sentence imposed" necessarily constitutes "clear error" within the meaning of Rule 35(a) and that a district court therefore has authority under that Rule to reconsider its sentence

on the basis of any claim of legal error, no matter how *un*clear the proper resolution of the legal question may be. That contention is contrary to the position advanced by petitioner in the court of appeals and to the plain text of Rule 35(a). The court of appeals correctly held that Rule 35(a) authorizes a district court to resentence a defendant only if the court's original sentence was based on an error that was "clear" in the sense of being "an obvious error or mistake * * * which would almost certainly result in a remand" from the court of appeals if the sentence were appealed. Pet. App. 21a (quoting Fed. R. Civ. P. 35 advisory committee's note (1991)).

a. In this Court, petitioner argues (Pet. 24-25) that the court of appeals erred by "interpret[ing] Rule 35 to create a class of sentencing errors that can only be corrected by a circuit court." In petitioner's view (Pet. 24), the "clear error" standard of Rule 35(a) is satisfied whenever the district court believes it committed "a legal error that has a consequential impact on the sentence imposed." That argument is contrary to the position advanced by petitioner before the court of appeals, and petitioner should be deemed to have waived it.

At oral argument before the court of appeals, petitioner invited the court to construe the "clear error" standard in Rule 35(a) consistently with the "plain error" standard of Federal Rule of Criminal Procedure 52(b). See Pet. App. 20a. As this Court has held, in order for an unpreserved claim of error to be corrected under Rule 52(b), the error must as a threshold matter be "plain," which the Court has equated with "obvious." *United States* v. *Olano*, 507 U.S. 725, 732-737 (1993). Petitioner likewise recognized below that the "clear error" standard of Rule 35(a) similarly requires that an error be "obvious," in addition to being reversible. Pet.

C.A. Br. 16 (construing "clear error" to be "an 'obvious error or mistake' which, if appealed, 'would almost certainly result in a remand'") (quoting Fed. R. Crim. P. 35 advisory committee's note (1991)). Necessarily, any rule that permits correction only of "obvious" errors "create[s] a class of sentencing errors" that are outside the rule's scope, Pet. 24, *i.e.*, those determinations that, albeit erroneous, were not obviously so. Petitioner should not now be heard to complain that the court of appeals adopted the standard he advocated.

b. In any event, petitioner's claim lacks merit. The plain text of Rule 35(a) creates the distinction of which petitioner complains: "[c]lear error," as well as arithmetical and technical error, is subject to correction under the Rule; any other perceived error is not. Fed. R. Crim. P. 35(a). The notes of the Advisory Committee on Criminal Rules confirm that the power to correct a sentence under Rule 35(a) applies only to "acknowledged and obvious errors in sentencing":

> The authority to correct a sentence under this subdivision is intended to be very narrow and to extend only to those cases in which an obvious error or mistake has occurred in the sentence, that is, errors which would almost certainly result in a remand.

Fed. R. Crim. P. 35 advisory committee's note (1991). Petitioner does not cite any decision of any court of appeals that equates the term "clear error" in Rule 35(a) with any "legal error that has a consequential impact on the sentence imposed," as petitioner urges, Pet. 24.

Petitioner contends (Pet. 13-15) that the court of appeals' decision conflicts with decisions from the First and Second Circuits, but that is not the case. In *United States* v. *Goldman*, 41 F.3d 785 (1994), cert. denied, 514

U.S. 1007 (1995), the First Circuit upheld the district court's authority to correct an error in sentencing based upon the court's mistaken impression that the defendant had no prior drug conviction, when, "[i]n fact," the defendant "had a prior drug conviction," which made the applicable maximum sentence life imprisonment. *Id.* at 789. Unlike the present case, the district court found that its error was "clear," *ibid.* and the defendant did not contest the obviousness of the error, but instead argued that it was "fundamentally unfair" to correct the error by imposing a higher sentence. *Ibid.* In *United States* v. *Waters*, 84 F.3d 86 (2d Cir.), cert. denied, 519 U.S. 905 (1996), the district court stated that it "clearly did not take * * * into account" the policy statement in Sentencing Guidelines § 7B1.3(e) on the calculation of sentences when time served would be credited by the Bureau of Prisons, although that Section did "clearly apply." *Id.* at 89 (quoting district court). The court of appeals adopted the advisory committee's note, which limits Rule 35(a) to correction of "an obvious error or mistake," *ibid.* (quoting *United States* v. *Abreu-Cabrera*, 64 F.3d 67, 72 (2d Cir. 1995)), and upheld the district court's determination that it "clear[ly]" did not consider a policy statement that "courts are *required* to consider" in sentencing, *id.* at 90; see *id.* at 91 ("we find that the district court neglected to *even consider* U.S.S.G. § 7B1.3(e)"). Thus, there is no conflict between the decision below and the other decisions construing Rule 35(a) upon which petitioner relies.[4]

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[4] Before 2002, the substance of Rule 35(a) was located in Rule 35(c). In 2002, the text of Rule 35(c) was moved to subsection (a), and nonsubstantive changes were made in the wording of that provision. See Fed. R. Crim. P. 35 advisory committee's note (2002). The provision is cited as Rule 35(a) throughout this brief.

A more recent decision of the Second Circuit confirms that it construes Rule 35(a) consistently with the court of appeals in this case. In *United States* v. *Donoso*, 521 F.3d 144 (2008), the Second Circuit reaffirmed its adoption of the advisory committee's interpretation that Rule 35(a) permits post-sentencing correction by the district court only in instances of "obvious error or mistake" that "would almost certainly result in a remand of the case to the trial court for further action." *Id.* at 146 (quoting *Abreu-Cabrera*, 64 F.3d at 72). Although the court of appeals recognized that the precise question of law that was the basis of the revised sentence in that case—whether "a district court may direct that a defendant's federal sentence run consecutively to a state sentence that has not yet been imposed by the state court"—had not previously been determined by the court of appeals, *id.* at 147, the court proceeded to hold that the reasoning of one of its precedents "in a slightly different context" "compel[led] the conclusion" that the district court lacked the authority to impose such a sentence, *id.* at 148, 149. Because the district court not only "erred" in its initial sentence, but "[f]urther, because, on appeal from that sentence, [the court of appeals] would 'almost certainly' have remanded" in light of circuit precedent, the initial sentence constituted "clear error" subject to correction under Rule 35(a). *Id.* at 149. The *Donoso* decision is thus entirely consistent with the court of appeals' insistence in this case that the district court's initial sentence be not merely erroneous, but "clearly" so before it can be corrected pursuant to Rule 35(a). Pet. App. 21a (noting that, on the underlying substantive question presented in this case "[t]here is no decision on point from any

court, and reasonable people could differ about the matter").[5]

Finally, petitioner argues (Pet. 23-24) that there is no "legal or practical value" in keeping district courts from issuing a revised sentence under Rule 35(a) any time they believe that the initial sentence rested on an error of law, even a debatable one. He argues that the purpose of the Rule is to avoid appeals and that allowing the correction of any perceived harmful error would further that goal. Yet there is little efficiency to be gained by expanding the scope of Rule 35(a) to encompass reconsideration by the district court of debatable points of law: If reasonable arguments exist on both sides of an issue, an appeal will often follow regardless of which way the district court resolves the question, and the withdrawal of the initial judgment and issuance of an amended judgment will only delay matters by starting a new clock for filing a notice of appeal by the party adversely affected by the modification. See Fed. R. App. P. 4(b)(1)(A)(i) and (B)(i) (time for appeal runs from "entry of either the judgment or the order being appealed").

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[5] The decisions cited in the court of appeals' opinion (Pet. App. 15a-16a) likewise uniformly recognize that an error must be obvious to be corrected under Rule 35(a). See *United States* v. *Yost*, 185 F.3d 1178, 1181 (11th Cir. 1999) ("[A]ny error to be corrected under that subsection must be obvious."), cert. denied, 529 U.S. 1108 (2000); *United States* v. *Cook*, 890 F.2d 672, 675 (4th Cir. 1989) (stating that any error to be corrected under predecessor to Rule 35(a) must be "an acknowledged and obvious mistake"); accord *United States* v. *Higgs*, 504 F.3d 456, 461 (3d Cir. 2007); *United States* v. *Galvan-Perez*, 291 F.3d 401, 407 (6th Cir. 2002); *United States* v. *Sadler*, 234 F.3d 368, 373 (8th Cir. 2000); *United States* v. *Barragan-Mendoza*, 174 F.3d 1024, 1029 (9th Cir. 1999); *United States* v. *Porretta*, 116 F.3d 296, 300 (7th Cir. 1997); *Abreu-Cabrera*, 64 F.3d at 72.

Further, petitioner ignores that Rule 35(a) was not intended to serve the interest of efficiency exclusively, but was also designed to further the public's interest in the finality of sentences, *i.e.*, it was "not intended to afford the court the opportunity to reconsider the application or interpretation of the sentencing guidelines." Fed. R. Crim. P. 35 advisory committee's note (1991). Petitioner's construction of Rule 35(a) would subordinate the Rule's interest in finality to a district court's second thoughts about the legality of the sentence. And, in any event, his policy arguments in favor of a broader authority in the district court cannot change the Rule's plain text by eliminating the express limitation that only "clear" errors are subject to correction by the district court.

c. Petitioner is also mistaken in his assertion (Pet. 16-20) that the court of appeals' decision conflicts with those of other circuits that hold that a district court's erroneous understanding of the extent of its sentencing discretion constitutes reversible error. None of those cases, however, involved the extent of a district court's power under Rule 35 to correct its own sentence. The cited cases stand for the proposition that when the court of appeals determines, applying the appropriate standard of review, that the district court misconstrued the scope of its sentencing discretion, such an error requires a remand, so that the district court may sentence the defendant in light of a correct understanding of its discretion.[6] In other words, those cases hold that such an

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[6] *United States* v. *Mejia-Pimental*, 477 F.3d 1100, 1109 (9th Cir. 2007) (holding that the district court's erroneous belief that it lacked sentencing discretion required a remand for resentencing); *United States* v. *Mancari*, 463 F.3d 590, 598 (7th Cir. 2006) (same); *United States* v. *Gardiner*, 463 F.3d 445, 461-462 (6th Cir. 2006) (same); *United*

error is not harmless and is an appropriate basis for remand. Those cases do not, however, hold that such "error" always and necessarily constitutes "clear error" in the sense, required by Rule 35(a), that the error be an "obvious" one. In all but one of the cases cited by petitioner, the defendant had preserved the objection and the court of appeals' review was *de novo*, such that any finding of non-harmless "error" was sufficient for a remand.[7] In *United States* v. *Gardiner*, 463 F.3d 445 (6th Cir. 2006), the one case cited by petitioner in which the defendant failed to preserve a claim that the district court erroneously lacked awareness of the extent of its sentencing discretion, the court of appeals noted that it could remand only if the district court's misapprehension of its discretion constituted "plain error." *Id.* at 460, 461. The court remanded based on the district court's "misapprehension" that it could not enhance the defendant's sentence on the basis of judicial fact-finding because the court's error was "clear under the law of

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States v. *Dominguez*, 296 F.3d 192, 194, 200 (3d Cir. 2002) (same); *United States* v. *Delgado-Reyes*, 245 F.3d 20, 22-23 (1st Cir. 2001) (same); *United States* v. *Pierce*, 132 F.3d 1207, 1208-1209 (8th Cir. 1998) (same); see also *United States* v. *Thorpe*, 191 F.3d 339, 344 (2d Cir. 1999) (holding that a district court's possible mistake as to its sentencing discretion requires remand for clarification of the district court's beliefs).

[7] See *Mejia-Pimental*, 477 F.3d at 1103 (defendant claimed entitlement to the safety-valve); *Mancari*, 463 F.3d at 596 (defendant sought below-guidelines sentence based on overrepresentation of his criminal history); *Dominguez*, 296 F.3d at 194-195 (reviewing de novo court's "refusal" to downward depart based on family circumstances); *Delgado-Reyes*, 245 F.3d at 22 (defendant and government had urged that court had discretion to depart); *Thorpe*, 191 F.3d at 342 (defendant had sought sentence of probation); *Pierce*, 132 F.3d at 1207-1208 (defendant urged that court could decline to impose prison sentence).

this Circuit." *Id.* at 461. Thus, *Gardiner* confirms that where the applicable standard for correcting an error with respect to the district court's sentencing discretion is "plain error" (or, as here, "clear error") some errors will not be subject to correction because they are not sufficiently obvious.

d. Although petitioner asserts (Pet. 22) that the district court's "discretion clearly was not limited in the manner he thought," petitioner does not seriously contend that the district court's mistake rose to the level of an "obvious" error. As the district court observed, before this Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005), the district court had "consistently" construed the Guidelines to preclude application of the safety valve "if the applicable guidelines range is above the mandatory minimum," Pet. App. 25a, 26a, based on the court's understanding that the text of Section 5C1.2 permitted a below-statutory-minimum sentence only if "the applicable guidelines" range placed the defendant below the statutory minimum. *Ibid.* The novel question that the district court faced was whether *Booker*, which rendered the Sentencing Guidelines advisory, 543 U.S. at 245, required a change to the court's "consistent[]" practice, a question as to which the court acknowledged the answer was "certainly is not clear." Pet. App. 25a-26a. Yet, while petitioner asserts that the district court "clearly" had discretion to apply Section 5C1.2 even when the defendant's advisory guidelines range was above the statutory minimum, Pet. 22, he does not even cite *Booker*, much less explain why, contrary to the district court's view, *Booker* renders the district court's consistent pre-*Booker* practice "clearly" erroneous.

Significantly, in order to rule in petitioner's favor, this Court would first have to resolve the question

whether the district court's initial view of its discretion was erroneous, a question of law on which no court of appeals has yet spoken. The court of appeals did not resolve the merits of the question in this case, Pet. App. 18a, relying instead on its determination that, in light of the absence of any precedent on point, the district court's error, if it was error, was not sufficiently "obvious" to come within Rule 35(a), *id.* at 21a. And the court of appeals has subsequently reiterated that the question remains an open one in that court. See *United States* v. *Quirante*, 486 F.3d 1273, 1276 (11th Cir. 2007).

2. Petitioner claims (Pet. 25-30) that, even if the district court lacked authority to impose its revised sentence, the court of appeals erred in remanding the case to the district court with directions to reinstate the original sentence, without first considering whether the originally imposed sentence was infected with legal error. Petitioner's claim lacks merit, and it does not warrant this Court's review.

The only appeal in this case was the government's appeal from the 11-day sentence imposed by the district court in its revised judgment. The only questions raised by the government in its appeal were (a) whether the district court had authority under Rule 35(a) to correct its purported error and (b) whether, if it did have such authority, the court's sentence of 11 days (time served) was unreasonable in this case. Pet. App. 13a. Petitioner did not challenge his initial sentence in the court of appeals, and the court had no occasion to pass on it. See Pet. C.A. Br. 15-36. Upon vacating the modification order, the court properly remanded the case for reinstatement of the initial sentence and entry of judgment accordingly. Pet. App. 22a. That is the routine practice of

courts of appeals when a district court modifies a sentence without authority.[8]

Petitioner may present the constitutional and other challenges to his original sentence to which he alludes (Pet. 26-30) in an appeal from the final judgment on remand reimposing that sentence or in a motion for collateral relief under 28 U.S.C. 2255, to the extent those arguments are allowed by his plea agreement. See Plea Agmt. ¶¶ 19-21 (allowing limited appeal and collateral review of the sentence). For instance, to the extent petitioner suggests that "the deficient performance of [his] initial trial counsel" deprived him of his constitutional right to the effective assistance of counsel, Pet. 29, or he believes that he would be entitled to a reduced sentence based on the retroactive amendments to the crack cocaine guidelines, Pet. 26-27, those claims are expressly preserved for appeal or collateral attack, Plea Agmt. ¶¶ 21(c), 22 (allowing such claims). Those claims are irrelevant, however, to the court's narrow decision in this appeal.

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[8] See *United States* v. *Griffin*, 524 F.3d 71, 82, 84-85 & n.15 (1st Cir. 2008) (after concluding that district court acted outside the time allowed by Rule 35(a), directing reinstatement of original sentence without reaching question whether district court correctly concluded that it had been error, in light of this Court's decision in *Cunningham* v. *California*, 127 S. Ct. 856 (2007), to enhance defendant's sentence based on judicially-found facts). See also *United States* v. *Robinson*, 368 F.3d 653, 657 (6th Cir. 2004); *United States* v. *Penna*, 319 F.3d 509, 513 (9th Cir. 2003); *United States* v. *Jones*, 238 F.3d 271, 273 (4th Cir. 2001) (per curiam); *United States* v. *Austin*, 217 F.3d 595, 598 (8th Cir. 2000); *United States* v. *Blackwell*, 81 F.3d 945, 947-949 (10th Cir. 1996); *United States* v. *Werber*, 51 F.3d 342, 347-349 (2d Cir. 1995); *United States* v. *Lopez*, 26 F.3d 512, 523 (5th Cir. 1994) (per curiam); *United States* v. *Daddino*, 5 F.3d 262, 265 (7th Cir 1993) (per curiam); *United States* v. *Whittington*, 918 F.2d 149, 152 (11th Cir. 1990).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 07-1042

IN THE

Supreme Court of the United States

PATRICK LETT,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ Of Certiorari to the United States Court Of Appeals For The Eleventh Circuit

PETITIONER PATRICK LETT'S SUPPLEMENTAL BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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Even in the brief time since Petitioner filed his Reply, the split of authority surrounding "clear error" under Federal Rule of Criminal Procedure 35(a) has continued to deepen. Two more Circuits, the Sixth and the Seventh, have now joined the fray, each issuing opinions wrestling with the contours of "clear error." *See United States v. Clark*, __ F.3d __, 2008 WL 3844167 (7th Cir., Aug. 19, 2008); *United States v. Branch*, __ F.3d __, 2008 WL 3288304 (6th Cir., Aug. 12, 2008). These opinions, both of which reflect an understanding of "clear error" different from that adopted in the Eleventh Circuit here, show that this issue will continue to fester, and that the Court's intervention is necessary, sooner rather than later.

1. The Seventh Circuit's opinion in *Clark* deepens the split regarding the meaning of "clear error" under Rule 35(a) in a case involving an error concerning statutory sentencing ranges. In *Clark*, the sentencing judge—like Judge Steele here—initially sentenced the defendant based on an erroneous belief as to the applicability of a mandatory statutory minimum sentence. 2008 WL 3844167, at *2-3. When the government brought this error to the district court's attention, the district judge, like Judge Steele, acknowledged and corrected his error within Rule 35(a)'s seven-day window. *Id.* at *3.

In contrast to the Eleventh Circuit, however, the Seventh Circuit *affirmed* the corrected sentence, holding that a sentence based on an erroneous belief as to the applicability of a mandatory statutory minimum was "clear error" subject to correction under Rule 35(a). *Id.* at *5. In language directly applicable here, the Seventh Circuit went on to say:

> We emphasize that such mistakes might be made by either party—if a defendant did not realize at sentencing that he was *not* subject to a mandatory minimum sentence, but the court erroneously applied one, the defendant could make a motion for a corrected sentence within the seven-day time period.

Id. at *6.

The Seventh Circuit essentially described the case here. Lett "did not realize at sentencing that he was *not* subject to a mandatory minimum sentence, but the court erroneously applied one." *Id.* The court then corrected its error within seven days. The Eleventh Circuit, however, in direct conflict with *Clark's* language, held that Rule 35(a) did *not* authorize Judge Steele to correct a sentencing error stemming from his mistake as to the applicability of a statutory mandatory minimum sentence. (Pet. App. 21a.) And it reached that result notwithstanding its acknowledgment that Judge Steele's misunderstanding likely "caus[ed] the court to impose a sentence higher that it would have ***had it correctly gauged the law***." (*Id.* 17a (emphasis added).)

In short, the Seventh Circuit's understanding of Rule 35(a) is sharply at odds with the understanding reflected in the Eleventh Circuit decision below.

2. The Sixth Circuit has also contributed to the growing confusion regarding Rule 35(a) "clear error" with its opinion in *Branch*. There, Branch pleaded guilty to possessing cocaine with an intent to distribute. 2008 WL 3288304, at *2. At his sentencing

hearing, the court concluded that Branch was safety-valve eligible. *Id.* It based this conclusion on its belief that Branch's criminal record warranted treating him as though he had only one criminal history point, not the two points calculated pursuant to the guidelines and reflected in the Pre-Sentence Report (the safety valve is available only to defendants with one or fewer criminal history points, *see* 18 U.S.C. § 3553(f)). *Branch*, 2008 WL 3288304, at *2. The government filed a motion under Rule 35(a), claiming that the court erred in its criminal history point calculation. In response, the court concluded it had in fact erred, and increased the sentence to the mandatory minimum. *Id.* at *3.

The defendant appealed claiming, like the government here, that the district court "lacked authority to modify the previously imposed sentence" as the court's error, if any, was not sufficiently clear in light of post-*Booker* authorities. *Id.* at *7. The Sixth Circuit rejected the defendant's argument and found that the court had indeed committed clear error. Determining whether the district court had "clearly erred," however, required the Sixth Circuit to undertake a lengthy analysis of (1) how, if at all, *Booker* undercut a pre-*Booker* Sixth Circuit decision, *id.* at *8-9, and (2) how *Booker* and *Kimbrough* impacted the § 3553(f) safety valve, an issue on which it sought guidance from opinions in other circuits, *id.* at *9-11.

The Sixth Circuit's willingness to find "clear error" after this lengthy, detailed analysis stands in sharp contrast to the Eleventh Circuit's determination that it did not need to even *reach* the issue of *Booker*'s impact because "reasonable arguments can be made

on both sides of" the issue, and thus any error could not be "clear." (Pet. App. 18a.) And the divergence in clear error framework is further exemplified by the Sixth Circuit's willingness, unlike the Eleventh Circuit, to look to opinions from other Circuits in connection with that analysis. (*See id.* 19a (Eleventh Circuit dismissing reliance on opinion from another circuit to show "clear error" because the opinion "is not binding in this Circuit").)

As *Branch* and *Clark* show, the meaning of "clear error" under Rule 35(a) is a frequently recurring issue, and one on which the Circuits fundamentally disagree. Petitioner respectfully urges the Court to grant certiorari and address this important conflict.

3. Further demonstrating the need for review, both *Clark* and *Branch* illustrate yet again that it is the United States' "heads-I-win, tails-you-lose" litigation strategy that lies at the root of the confusion among the circuit courts, and also that the government can receive an unfair advantage from that confusion. The government seeks a narrow understanding of "clear error" in cases like the one here when the *defendant* is seeking correction that would *lower* his sentence, but advocates a broader understanding in cases like *Clark* and *Branch* when the *government* seeks a change that *increases* the original sentence. Bedrock principles of fairness demand a uniform approach to "clear error" under Rule 35(a), and Petitioner submits that this case presents an ideal vehicle for the Court to provide the necessary clarification.

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IN THE

Supreme Court of the United States

PATRICK LETT,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF IN SUPPORT OF PETITIONER PATRICK LETT

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REPLY

The United States' Brief in Opposition, coupled with cases decided since Lett filed his petition, shows why review is necessary. Criminal Rule 35(a) allows district courts a seven-day window to correct criminal sentences that resulted from "clear error." The lower courts are in conflict, though, as to what constitutes "clear error." Indeed, as the Petition shows, the decision below implicates three separate conflicts. While the United States downplays these conflicts, its attempt to reconcile the various cases fails to explain their divergent results. And cases decided after Lett filed his petition have deepened the confusion, while also demonstrating that this is a frequently-recurring issue warranting the Court's attention.

The government's attempt to reconcile the decision below with Rule 35(a)'s underlying purposes also fails. As Petitioner showed, the rule is designed to avoid costly and time-consuming appeals when a district court quickly recognizes that it has made a legal error in its original sentence that would almost certainly result in the sentence being vacated on appeal. The government does not dispute that when a court fails to understand the range of sentencing authority open to it, like the judge originally did here, that is a textbook example of the type of error that requires resentencing after appeal. Thus, judicial efficiency favors allowing district courts to fix such errors, so long as the judge does so within Rule 35(a)'s narrow time limit.

Perhaps the most troubling aspect of the confusion surrounding Rule 35(a) is the United States' affinity for a heads-I-win, tails-you-lose litigation strategy: it

argues for a narrow understanding of "clear error" under Rule 35(a) when as here the *defendant* is seeking correction that would *lower* his sentence, but advocates a broader understanding whenever elsewhere the *government* seeks a change that *increases* the original sentence. Because the government benefits from the lower courts' inconsistent approaches to the Rule, it now prefers this Court to deny review here. Fundamental rule of law notions, as well as basic principles of fairness, however, require a uniform approach to clear error under Rule 35(a), and this case offers an ideal vehicle to develop that framework.

A. Lett Advanced His Claim Below And Has Not Waived It.

Perhaps recognizing that it has no good response to the conflicts that Lett has identified, nor any strong basis for defending the merits of the Eleventh Circuit's ruling below, the United States instead leads its Opposition with a misguided claim that Lett has somehow waived the issue he seeks to raise here. That is not so. First, as appellee, Lett is free to urge all grounds in support of the district court's decision, and thus he has not waived anything. See *Independence Park Apartments v. United States*, 449 F.3d 1235, 1240 (Fed. Cir. 2006) ("as appellee, the government was not required to raise all possible alternative grounds for affirmance in order to avoid waiving any of those grounds"). More importantly, though, the claim that Lett seeks to present here is that Judge Steele's original sentence resulted from "clear error," which is the *very claim* that Lett pressed in the appeals court below. See *Lebron v. Nat'l R.R. Passenger Corp.*, 115 S. Ct. 961, 965 (1995)

("Our traditional rule is that '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below'" (internal citation omitted)).

If anything, it is the government that is flirting with waiver based on its inconsistent litigating positions—it now asserts that the Eleventh Circuit was correct to order imposition of a 60 month sentence, while earlier the government claimed that the appropriate relief was instead to vacate the new sentence and remand for resentencing. Cf. *Greenlaw v. United States*, 128 S. Ct. 2559, 2564 (2008) (stressing the "principle of party presentation" in rejecting a circuit court's *sua sponte* decision to order a sentence increase not sought by the Government). Indeed, this Court's recent *Greenlaw* ruling criticized decisions by appellate judges "adding years to a defendant's sentence on their own initiative" and cautioned against "an appellate panel ruling on an issue of law no party tendered to the court." Id. at 2570.

B. The Lower Courts Are Split On "Clear Error."

The government likewise fails to reconcile the split in authority regarding the scope of clear error under Rule 35(a). In its Opposition, the United States correctly notes that the Eleventh Circuit decision below ruled that an error does not qualify as a Rule 35(a) "clear error" if "'reasonable arguments can be made on both sides.'" See Opp. at 7, quoting Pet. App. at 17a-18a. But it then wrongly asserts that other circuit decisions, including the Second Circuit's recent decision in *United States v. Donoso*, 521 F.3d 144 (2008), likewise incorporate this same standard.

In fact, *Donoso's* language is flatly inconsistent with the Eleventh Circuit's reasonable-arguments-on-each-side standard.

In *Donoso*, a case decided after Lett filed his petition, the trial court had originally concluded that under 18 U.S.C. § 3584 it could order the defendant's federal sentence to run consecutively to a yet to be imposed state sentence. The court then *sua sponte* reversed itself on that issue a few days later, and resentenced the defendant under Rule 35(a). On appeal, the Second Circuit concluded that the district court's error was "clear error" under Rule 35(a). But, in doing so, it noted that:

> This Court has not determined whether, under § 3584(a), a district court may direct that a defendant's federal sentence run consecutively to a state sentence that has not yet been imposed by the state court. Other courts of appeals are divided on the question.

521 F.3d at 147. It then ultimately resolved the consecutive sentence question by reasoning by analogy from circuit precedent that it acknowledged arose "in a slightly different context." Id. at 148.

As this discussion suggests, the legal question at issue in *Donoso* was a paradigmatic example of an issue on which "reasonable arguments can be made on both sides." See Pet. App. at 17a-18a. Yet, the *Donoso* court had no problem concluding that the error was still a "clear error" under Rule 35(a). According to the court, because the district court judge had made a legal error regarding the range of his sentencing authority, the error was of the type that would almost certainly result in remand on

appeal, and it thus fell within Rule 35(a)'s ambit to allow immediate correction. Id. at 149.

Indeed, the government itself does not consistently seek the no-reasonable-minds-could-differ standard that it suggests is the nationwide rule. As explained in *Gholikhan v. United States*, Nos. 08-60751-CIV, 05-60238-CR, 2008 WL 2627715 (S.D. Fla. July 3, 2008), another case that arose after the petition was filed, the district court originally sentenced the defendant (who had pled guilty to arms export violations) to time served based on the court's belief that the advisory guidelines range was 0-6 months. The United States did not object at the initial sentencing, but shortly thereafter invoked Rule 35(a) in a motion seeking a higher sentence based on its argument that applicable guideline range had been miscalculated. (Interestingly, the government pressed this argument in *Gholikhan* in late April 2008, but now in this case asserts that Rule 35(a) is "not intended to afford the court the opportunity to reconsider the application or interpretation of the sentencing guidelines." Opp. at 13, *quoting* Fed. R. Crim. P. 35 advisory committee's notes (1991).) In its brief in *Gholikhan*, the United States cited no circuit precedent regarding the guidelines question at issue, merely arguing that its suggested interpretation of the guideline was "supported by" precedent from two *other* circuits. See Government's Motion to Correct Sentence, filed April 29, 2008, at 4-5, *U.S. v. Gholikhan*, Case No. 05-60238-CR (available on Pacer). And nowhere did it suggest that Rule 35(a) was limited to those errors on which no reasonable person could differ.

Moreover, the district court's analysis in *Gholikhan* of the "error" in its original sentence similarly belies the obviousness standard the government champions here. The court reached its conclusion as to error only after "conduct[ing] a hearing, ... hearing the arguments of counsel, and considering the law," 2008 WL 2627715, at *1, hardly the description one would expect if this had been a glaringly obvious error. Yet, the court nonetheless found, at the government's urging, that it had committed "clear error" under Rule 35(a). See id.

In short, the Eleventh Circuit below insisted that "clear error" means that the *fact of the error* must be obvious, while other courts sensibly require just that the error be of the type that, if the appeals court agrees that an error occurred, would obviously require the sentence to be vacated and the case remanded for resentencing. Of course, at this stage, the Court is not tasked with determining whether *Donoso* and the decisions like it, on the one hand, or the decision below, on the other, represent the better understanding and application of "clear error" under Rule 35(a). But Petitioner respectfully asserts that no "reasonable arguments can be made" that the courts are not in conflict regarding the scope of "clear error." And, as stressed before, that conflict arises at least in part because the government adopts different positions on "clear error" depending on whether it is the government claiming error and seeking to correct sentences upward, or instead defendants that have identified the legal errors and are seeking to have their sentences corrected downward. Not surprisingly, the United States' willingness to press conflicting arguments has spawned conflicts and

confusion in the lower courts—conflicts and confusion that only this Court can resolve.

C. The Approach Below Conflicts With Rule 35(a)'s Language And Purpose.

1. The government's attempt to square the result below with Rule 35(a)'s purpose of providing an efficient means for district court judges to correct their legal sentencing errors is also unavailing. Opp. at 12-13. The Brief in Opposition does not deny that Judge Steele erred in originally believing that he was required to sentence petitioner Patrick Lett to no less than five years' incarceration for Lett's minor, non-violent drug offense. Nor does the United States dispute that Judge Steele acted within Rule 35's brief seven-day window to correct that error and impose a lawful (and lower) sentence. Instead, the United States urges an approach to the Rule that allows such errors to be corrected, if at all, only after first conducting a lengthy—and unnecessary—appeal concerning the purported clarity of the error, the very antithesis of the "speed and efficiency" that Rule 35(a) seeks to promote.

To be sure, if the district judge had been *wrong* in his ultimate conclusion that the statutory minimum did not apply, then by all means the Eleventh Circuit should have overruled the district court's action under Rule 35(a), because then the district court would not have arrived at its original sentence against the backdrop of a legally-erroneous understanding of the available range of sentencing options. But the Eleventh Circuit did not find, and the government did not even argue, that Judge Steele was required to impose a five-year sentence, only that it was not *obvious* that the five-year minimum

did not apply. Thus, the Eleventh Circuit's approach will require the case to go back down to the trial court, and then back up on appeal, to get at the critical underlying legal issue (i.e., whether there is an applicable five-year statutory mandatory minimum), a procedural result that makes no sense, and one that does not serve Rule 35's interests.

Moreover, the government does not, and cannot, dispute that circuits across the country have held that when a district court errs in determining the range of its sentencing authority, as happened here, that is the type of error that requires an appellate court to vacate the sentence and remand. See Pet. at 18-20. Consistent with those holdings, then, such errors also meet the test for "clear error" under Rule 35(a), which is designed to capture those errors "which would almost certainly result in a remand of the case to the trial court" if raised on appeal. Fed. R. Crim. P. 35 advisory committee's note. In short, if the judge originally erred in his understanding as to whether the statutory minimum applied, that error falls in the category of "clear error," and the Eleventh Circuit erred in finding that it could overturn the trial court's decision without first addressing that key legal issue.

2. The government is similarly wrong to rely on notions of "finality" to support its definition of "clear error." See Opp. at 13. Finality interests are principally served by Rule 35(a)'s short seven-day time limit for corrective action, a time limit that is jurisdictional and strictly enforced by lower courts. *See, e.g.*, *United States v. Higgs*, 504 F.3d 456 (3d Cir. 2007); *United States v. Shank*, 395 F.3d 466 (4th Cir. 2005); *United States v. Penna*, 319 F.3d 509 (9th

Cir. 2003); *United States v. Werber*, 51 F.3d 342 (2d Cir. 1995).

Moreover, when the United States argues that allowing the district court to correct legal errors will "subordinate the Rule's interest in finality to a district court's second thought about the legality of the sentence," Opp. at 13, it disregards the essential fact that this *is precisely what the rule is intended to do.* If a district court has made a legal error regarding the legally authorized sentencing range, Rule 35(a) provides a short time window within which the court can self-correct without the need for an appeal. The rule recognizes that a sentence infected by significant legal error should not be finalized before giving a district court (and the parties) a very brief period to examine whether such an error exists and needs to be corrected.

The government's concerns would be justified in a case where a district court, having second thoughts about its exercise of its sentencing discretion, adjusted its sentence through Rule 35(a). But lower courts have consistently and justifiably emphasized that Rule 35(a) should not and cannot be used by district courts to change sentences under such circumstances, and the judge did not do so here. As detailed in the Petition, Judge Steele has never had second thoughts. He has consistently concluded and ruled that Patrick Lett's minor and non-violent role in the crime, his speedy, voluntary and complete withdrawal from the criminal conduct, and his long and unblemished record of exemplary military service to this country warranted the imposition of the lowest possible term of imprisonment. Unfortunately, the judge originally operated under

the mistaken impression that the lowest permissible minimum prison term was five years. As soon as he realized his legal error, and realized that his error meant Lett would be forced to serve unnecessary years in prison, Judge Steele timely invoked Rule 35(a) to correct his clear error in exactly the way the rule's drafters envisioned.

Not only does the government's legal position interfere with the proper operation of the Rule, it also would place a district judge in a very difficult position whenever the judge immediately discovers that a serious (but arguably debatable) legal error infects the initial sentencing decision. According to the approach that the Eleventh Circuit and the United States adopted here, in such situations the district judge should not act swiftly to correct these legal errors pursuant to Rule 35(a), but rather should sit on the sidelines and await the results of a lengthy appeal to resolve the issue and return the case back to the district court to allow the legal correction that the district court could easily have implemented in the first instance.

Because such an approach to Rule 35 is both inefficient and disrespectful of district judges' efforts to follow the law, it is understandable that the United States does not argue for that approach when it identifies legal errors it wants corrected. But, here, where the United States does not want a legal error corrected, it adopts a view of Rule 35(a) that undercuts the very purpose of the rule.

* * *

A Lexis search conducted in late July reveals more than three dozen federal district and circuit courts

that have issued written decisions addressing the application of Rule 35(a) in just the few months since Lett filed his petition. *See, e.g., United States v. Houston*, 529 F.3d 743 (6th Cir. 2008) (affirming district court's denial of Rule 35(a) motion and holding that district court correctly concluded that claimed error did not constitute "clear error" under Rule 35(a)); *United States v. Fortino*, No. 07-3476, 2008 U.S. App. Lexis 12593, at *2-3 (8th Cir. June 13, 2008) (affirming district court's use of Rule 35(a) to impose an amended sentence and rejecting defendant's argument that the claimed error in the initial sentence, which was occasioned by defendant's fraud, was not "clear"); *United States v. Griffin*, 524 F.3d 71, 83, 85 n.15 (1st Cir. 2008) (holding that district court erred in re-sentencing defendant outside Rule 35's 7-day window and declining to reach whether initial sentence was infected with "clear error" under Rule 35); *United States v. Vascan*, No. 3:07CR203, 2008 U.S. Dist. Lexis 46499, at *3-4 (N.D. Ohio June 12, 2008) (denying Rule 35(a) motion and holding that initial sentence was "not infected with error, much less the clear error required" under Rule 35(a)); *United States v. Somers*, No. 07-CR-288, 2008 U.S. Dist. Lexis 38342, at *2 (W.D. Wis. Apr. 29, 2008) (denying Rule 35(a) motion and holding that sentence was not infected by clear error requiring correction); *United States v. Zepeda-Dominguez*, 545 F. Supp. 2d 547, 550 (E.D. Va. 2008) (denying Rule 35(a) motion because court could not say that claimed error constituted "clear error" under Rule 35(a)). As this ongoing parade of cases reflects, Rule 35(a) is an important and frequently invoked tool for avoiding wasteful and unnecessary appeals. Confusion regarding the scope of "clear error," however, will

blunt the Rule's effectiveness in achieving its framers' goals. Lett respectfully urges the Court to grant certiorari and resolve that confusion.

Respectfully submitted,

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